IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1148

[redacted] individually and [redacted] on behalf of [redacted] CORPORATION CO., INC., and [redacted] on behalf of [redacted] INC., (a defunct corporation),

Petitioners

-against-

[redacted] TITLE GUARANTEE CO., COUNTY [redacted] CORPORATION, [redacted], [redacted], [redacted],

SUBCHAPTER I.—GENERALLY

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. R.S. § 1978.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. § 1980.

Historical Note

Derivation. Acts July 31, 1861, c. 33, 12 Stat. 284; Apr. 20, 1871, c. 22, § 2, 17 Stat. 13.

§ 1986. Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. R.S. § 1981.

§ 1994. Peonage abolished

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void. R.S. § 1990.

Section 10, Clause 1. Treaties, letters of marque and reprisal

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; • • •

Section 10, Clause 1, continued. Coinage of money

• • • coin Money; • • •

Section 10, Clause 1, continued. Bills of attainder; ex post facto laws

• • • pass any Bill of Attainder, ex post facto Law, • • •

Section 10, Clause 1, continued. Impairment of contracts; title of nobility.

• • • or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIII—SLAVERY ABOLISHED

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Saul STAMBLER, Rose Stambler, Empire Park, Inc. (a defunct corporation), Empire Park, Inc. and Prudential Operating Co., Inc., Plaintiffs,

v.

John J. DILLON, Title Guarantee Co., Peter Wasylec, Marcy Finke, George B. Gordon, David Avstreih, Leonard Weiss, John J. O'Malley and County Seller Corporation, Defendants.

No. 68 Civ 887.

United States District Court
S. D. New York.

July 12, 1968.

Complaint against state judge for violation of constitutional rights, wherein judge moved to dismiss complaint. The District Court, McGohey, J., held that, in absence of allegation or showing that state judge had discriminated against any plaintiff because of color, complaint failed to state claim against judge under federal statute providing for equality of right regardless of color and that complaint alleging only that state judge had participated in alleged conspiracy and showing only that he performed normal duties of his office in trial and decision of issues in strongly contested litigation failed to state claim against judge on ground that he had conspired to deprive plaintiff of constitutional rights.

Summary judgment entered dismissing complaint.

1. Declaratory Judgment ⇐=324

Although sections cited in complaint had no application to subject matter of action, where it was clear from prayer for relief that pleader intended to assert jurisdiction under similarly numbered sections authorizing declaratory judgments, complaint would be deemed amended accordingly. 28 U.S.C.A. §§ 2201, 2202.

2. Courts ⇐=284

Federal district court had jurisdiction of action brought against state judge

for deprivation of constitutional rights. 28 U.S.C.A. § 1343.

3. Judges ⇐36

Doctrine of judicial immunity does not preclude granting of injunctive relief against judge in proper case in which no money damages are sought to be recovered from judge.

4. Civil Rights ⇐13

In absence of allegation or showing that state judge had discriminated against any plaintiff because of color, complaint failed to state claim against judge under federal statute providing for equality of right regardless of color. 42 U.S.C.A. §§ 1981, 1982.

5. Conspiracy ⇐18

Complaint alleging only that state judge had participated in alleged conspiracy and showing only that he performed normal duties of his office in trial and decision of issues in strongly contested litigation failed to state claim against judge on ground that he had conspired to deprive plaintiff of constitutional rights. 42 U.S.C.A. §§ 1981–1983, 1985, 1986.

6. Action ⇐6

Frivolous claims must be disregarded.

Saul Stambler, Rose Stambler, pro se on behalf of themselves and the Corporate plaintiffs.

Louis J. Lefkowitz, Atty. Gen., of the State of New York, New York City, for defendant John J. Dillon; Mortimer Sattler, Asst. Atty. Gen., of counsel.

McGOHEY, District Judge.

The defendant John J. Dillon, a justice of the New York Supreme Court, Westchester County has moved pursuant to clauses (1), (2) and (6) of Federal Civil Rule 12(b) to dismiss the complaint for lack of both subject matter and personal jurisdiction and for failure to state a claim upon which relief may be granted; and pursuant to Rule 56(b) for summary judgment in his favor. An opposing affidavit of Saul Stambler, factual matters in his brief and papers heretofore filed herein in this Court having been received and considered on this motion, it is treated and disposed of as provided in Rule 56.

[1] The complaint, which is far from a model of concise pleading, asserts in paragraph FIRST that the Court's jurisdiction "arises under Title 28 U.S.C., Sections 1331, 1332 and 1343; Title 42 U.S.C., Sections 1981, 1982, 1983, 1985, 1986; 2201 and 2202 (sic). The Constitution of the United States and in particular the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments thereto." Sections 2201 and 2202 of Title 42, which prescribe the powers of the Atomic Energy Commission, have no application to the subject matter of this action. However, since it is clear from the prayer for relief that the pleader intended to assert jurisdiction under the similarly numbered sections of Title 28, which authorize declaratory judgments, paragraph FIRST will be deemed amended accordingly.

The plaintiffs were the unsuccessful parties in three related civil actions which by order of Justice Dillon were tried together before him. The defendants, other than he, were the successful parties, their trial counsel, a trial witness and others alleged to have participated in certain real estate transactions which were the subject matter of those actions. Claiming that the plaintiffs' defeat in the State Court resulted from a conspiracy among Justice Dillon acting under color of law and the other defendants to deprive the plaintiffs of their property without due process of law, equal protection of the laws and other constitutional and statutory rights, the complaint seeks a judgment declaring the State Court judgment null and void and an injunction restraining all the defendants from enforcing it; and from "impeding, intimidating, hindering and preventing the plaintiffs from exercising the rights, privileges and immunities guaranteed to them by the Constitution and Laws of the United States." It also

seeks damages of $500,000 from all the defendants other than Justice Dillon.

Paragraph SECOND sub. par. 9 of the complaint alleges that Justice Dillon is included as a co-defendant "to establish his part in the conspiracy which is the subject of this action and to give the Court jurisdiction over the acts which are in violations (sic) of the plaintiffs' rights, privileges and immunities, to give the Court the power to halt and enjoin said acts of the conspiracy to mitigate the damage to these plaintiffs." The acts by which it is alleged Justice Dillon furthered the conspiracy are, as set forth in paragraphs FOURTEENTH through TWENTY-FOURTH, that in July 1964, over the plaintiffs' objection, he consolidated the State Court actions for trial before himself during the following September; that on September 25 he denied the plaintiffs' motion for adjournment and during the trial favored their adversaries by his rulings on evidence and by his final decision, a copy of which marked exhibit B is annexed to and made part of the complaint; that by his decision, though lacking jurisdiction to do so and in the absence of an indictment, he "convicted" Saul Stambler of fraud and deceit; imposed "involuntary servitude" on him and subjected the plaintiffs to "harsh and shameful punishment."

The State Court actions arose out of the defendant Wasylec's efforts under pressure of time to acquire title to a portion of a gore running through a large parcel of real property he was under contract to sell. He ultimately acquired title to the needed piece for $15,000 from Saul Stambler who, under circumstances stated in Justice Dillon's decision, had acquired it only shortly before at a much lower price. In the first of the State Court actions Wasylec sued to recover the $15,000. Justice Dillon concluded that Saul Stambler had practiced fraud and deceit on his vendors and, therefore, should not be permitted to profit by his wrong. Saul Stambler claims this denied him due process in violation of the Fourteenth Amendment and constituted his "conviction" of a crime, while denying him his right to have the evidence against him considered by a grand jury and also his right to a public trial by a jury of his peers, all in violation of the Fifth and Sixth Amendments. Justice Dillon awarded Wasylec $12,000, allowing Stambler and his associates to retain $3,000 for their expenses and his services in locating his vendors and acquiring their title. Saul Stambler claims this deprived him of his property without due process in violation of the Fourteenth Amendment and also subjected him to "involuntary servitude" in violation of the Thirteenth Amendment since, he contends, he never agreed to work for Wasylec. It may be that this is also the "harsh and shameful punishment" referred to above and constitutes the claimed violation of the Eighth Amendment. It is not clear just how it is claimed the Seventh Amendment was violated.

Judgment on Justice Dillon's decision was entered on April 22, 1965, and affirmed by the Appellate Division, Second Department on June 12, 1967.[1] An appeal to the Court of Appeals was dismissed on November 2, 1967.[2] The notice of appeal stated that the appellants were "relying solely upon the questions directly involving the provisions of Article 1, Sections 1, 5, 6, 7 and 11 of the Constitution of the State of New York and Amendments Fifth, Thirteenth and Fourteenth, Sec. 1 of the Constitution of the United States and Title 42 Sec. 1994 of the United States Code, • • •." Chief Judge Fuld's order of dismissal states its ground to be "that no constitutional question is involved."[3] The plaintiffs, as far as appears, did not seek Su-

1. Wasylec v. Stambler, 28 A.D.2d 825, 282 N.Y.S.2d 665 (App.Div.1967).

2. 20 N.Y.2d 688 (1967).

3. The notice of appeal and order of dismissal are incorporated in an affidavit by the defendant Leonard Weiss filed on March 3, 1968, in opposition to the plaintiffs' motion for a preliminary injunction. This was denied by Judge Herlands whose order, entered March 28, 1968, is the subject of a pending appeal by the plaintiffs.

preme Court review. They commenced the instant action on February 8, 1968. The complaint was filed by an attorney who, it is alleged, has since withdrawn. The action is now being prosecuted by the Stamblers in person.[4]

[2] The court clearly has jurisdiction of the action as against Justice Dillon under section 1343 of Title 28 U.S.C. Accordingly, it is unnecessary to consider whether as against him jurisdiction also exists under sections 1331 and 1332 of that title as alleged in the complaint. The question remains whether the complaint states any claim against Justice Dillon on which relief may be granted and again it is clear it does not.

[3] Initially it should be noted that the Attorney General's reliance on the doctrine of judicial immunity is misplaced. Pierson v. Ray[5] and Morgan v. Sylvester[6] which he cites were both actions seeking money damages. No damages are sought to be recovered from Justice Dillon and the doctrine does not preclude the grant of injunctive relief against a judge in a proper case.[7]

[4] Sections 1981 and 1982 of Title 42 U.S.C. both provide for equality of rights regardless of color. Here it is neither alleged nor shown that Justice Dillon discriminated against any plaintiff because of color. Accordingly, the complaint fails to state a claim against Justice Dillon on which relief may be granted under either of these sections.[8]

Section 1986 which grants only an action for damages, likewise affords no basis for a relievable claim since no claim for damages is asserted against Justice Dillon.

[5] There remains to be considered the claimed conspiratorial deprivation of the plaintiffs' rights by Justice Dillon. Whether such a claim may be laid under sections 1983 and 1985 of Title 42 need not be decided here for in any event the complaint fails to allege sufficient facts to show that Justice Dillon was part of any such conspiracy if one existed.[9] The complaint does no more than charge Justice Dillon in the most general terms with participation in the alleged conspiracy. This is not enough.[10] Apart from the allegations which will be considered later that Saul Stambler was "convicted" and subjected to "involuntary servitude," the complaint shows only that the judge performed the normal duties of his office in the trial and decision of the issues in a strongly contested litigation.

[6] The claims of "conviction" and "involuntary servitude" are, as the complaint on its face shows, frivolous and must be disregarded.[11]

The motion, treated as one for summary judgment, is granted.

Summary judgment dismissing the complaint against the defendant John J. Dillon may be entered forthwith, since there is no just reason for delay.[12]

4. Saul Stambler's affidavit in opposition to the instant motion.

5. 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1968).

6. 125 F.Supp. 390, Aff'd. 220 F.2d 758, Cert. denied 350 U.S. 887, 76 S.Ct. 112, 100 L.Ed. 783, rehearing denied 350 U.S. 939, 76 S.Ct. 291, 100 L.Ed. 825 (1956).

7. See United States v. Clark, 249 F.Supp. 720, 727 (S.D.Ala.1965).

8. Agnew v. City of Compton, 239 F.2d 226, 230 (9th Cir. 1957).

9. See Powell v. Workmen's Compensation Board of the State of New York, 327 F.2d 131, 137 (2 Cir. 1964).

10. Id.

11. See Jemsura v. Belden, 281 F.Supp. 200 (N.D.N.Y.1968).

12. Rule 54(b) Federal Rules of Civil Procedure.

293 F.Supp.—41½

acting and conspired in such a way as to violate certain civil rights statutes. The District Court, Herlands, J., held that the amended complaint was insufficient to state a cause of action.

Amended complaint dismissed.

1. Civil Rights ⇐13

Where plaintiffs appeared pro se and raised claim under the civil rights statutes, the court gave a liberal reading to the amended complaint. 42 U.S.C.A. § 1981 et seq.

2. Civil Rights ⇐13

Where a litigant raises claims under civil rights statutes, even though complaint appears to be insubstantial, the most appropriate procedure is to assume jurisdiction and then decide whether the pleading states a claim for relief. 42 U.S.C.A. § 1981 et seq.

3. Judges ⇐49(1)

A charge that a judge who rules against litigant is thereby inevitably prejudiced against him is frivolous and harassing.

4. Courts ⇐262(1)

The court has jurisdiction under statute giving district court jurisdiction where matter in controversy exceeds $10,000 and arises under Constitution, or treaties of United States if a cause of action is alleged under the Fifth, Sixth, Thirteenth and Fourteenth Amendments and the jurisdictional amount exists. 28 U.S.C.A. § 1331; U.S.C.A.Const. Amends. 5, 6, 13, 14.

5. Conspiracy ⇐18

Amended complaint, indicating that plaintiffs were unsuccessful plaintiffs in civil actions in New York court and alleging a conspiracy between New York judge and the other defendants to deprive plaintiffs of their property without due process of law and in violation of equal protection clause of Fourteenth Amendment stated no claim upon which relief could be granted under statutes implementing Thirteenth and Fourteenth Amendments and prohibiting denial of

Saul STAMBLER, Rose Stambler, Empire Park, Inc. (a defunct corporation), Empire Park, Inc., Prudential Operating Co., Inc., Plaintiffs,

v.

John J. DILLON, Title Guarantee Co., Peter Wasylec, Marcy Finke, George B. Gordon, David Avstreih, Leonard Weiss, John J. O'Malley, County Dollar Corporation, Defendants.

No. 68 Civ. 537.

United States District Court S. D. New York.

June 23, 1969.

The plaintiffs alleged in their amended complaint that the defendants

equal protection of the laws on grounds of race or color and guaranteeing to non-white citizens equal property rights with white persons. 42 U.S.C.A. §§ 1981, 1982; U.S.C.A.Const. Amends. 13, 14.

6. Civil Rights ⇐13

The requirement that action be taken under color of state law is indispensable to establishment of claim for relief under statute giving right of action in tort to every individual whose federal rights are infringed by any person acting under color of state law; although state officials are usually the only people who can act with the authority of the state in order for there to be a misuse of power derived from the state, state action can be established if defendants who are not connected with the state are willful participants in joint activity with the state or its agents. 42 U.S.C.A. § 1983.

7. Civil Rights ⇐13

New York judge was immune from liability under civil rights action which asserted that plaintiffs were unsuccessful parties in civil actions in New York court and that there was a conspiracy between New York judge and the other defendants to deprive plaintiffs of their property without due process of law and in violation of equal protection clause of Fourteenth Amendment and other constitutional rights, and other defendants who were successful parties in state court, their trial counsel, a trial witness and others alleged to have participated in real estate transactions which were subject matter of state court actions did not act under color of state law or state authority for purposes of civil rights act. 42 U.S.C.A. §§ 1981–1986.

8. Civil Rights ⇐13

Attorneys are not state officers, but private persons, for purposes of civil rights act. 42 U.S.C.A. § 1983.

9. Civil Rights ⇐13

A witness at a trial is not acting under color of state law for civil rights purposes. 42 U.S.C.A. § 1983.

10. Federal Civil Procedure ⇐1781

Where it appeared beyond doubt that plaintiffs could prove no set of facts to support their allegations of state action in their civil rights action, the amended complaint was dismissed for failure to state a claim. 42 U.S.C.A. §§ 1981–1986, 1994; Fed.Rules Civ.Proc. rule 12(b) (1, 2, 6), 28 U.S.C.A.

11. Civil Rights ⇐1

The civil rights statute cannot be used to redress what are essentially infringement of property rights. 42 U.S.C.A. § 1983.

12. Conspiracy ⇐18

Amended complaint indicating that plaintiffs were unsuccessful parties in civil actions in New York court and alleging a conspiracy between New York judge and the defendants to deprive plaintiffs of equal protection of laws was insufficient to state cause of action for conspiracy to interfere with civil rights. 42 U.S.C.A. § 1985.

13. Federal Civil Procedure ⇐2737

Even though plaintiffs' civil rights suit was unfounded and was probably maintained in bad faith, where plaintiffs had been granted leave to file an amended complaint, plaintiffs would not be taxed with attorneys' fees. 42 U.S.C.A. § 1981 et seq.

Saul Stambler, Rose Stambler, pro se.

Louis J. Lefkowitz, Atty. Gen., of State of New York, for defendant John J. Dillon; Mortimer Sattler, New York City, of counsel.

Avstreih, Martino & Weiss, Mt. Vernon, for defendants David Avstreih, Leonard Weiss, Peter Wasylec; Leonard A. Weiss, Mount Vernon, of counsel.

Daniel Goldberg, New York City, for defendant George B. Gordon.

Finke, Jacobs & Hirsch, New York City, for defendant Marcy Finke; Louis Gruss, New York City, of counsel.

John J. Boyle, New York City, for defendants County Dollar Corporation, Title Guarantee Co., John J. O'Malley.

OPINION

HERLANDS, District Judge:

The amended complaint in the instant action alleges that the defendants acted and conspired in such a way as to violate various civil rights statutes, *inter alia*, 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986, 1994, and the Fifth, Sixth, Thirteenth and Fourteenth Amendments to the United States Constitution. Plaintiffs assert that jurisdiction arises under 28 U.S.C. §§ 1331, 1332 and 1343; and declaratory relief is sought under 28 U.S.C. §§ 2201 and 2202.

Answers by all the defendants except Justice Dillon assert the defenses of lack of subject matter jurisdiction, lack of in personam jurisdiction, res judicata and failure to state a claim upon which relief can be granted.

By this group of motions all the defendants move to dismiss the amended complaint under Fed.R.Civ.P. 12(b) (1), (2) and (6) for lack of subject matter jurisdiction; lack of jurisdiction over the person; for failure to state a claim; and, alternatively, defendants urge the Court to grant summary judgment dismissing the complaint for failure to state a claim. An injunction prohibiting the plaintiffs from continuing the instant action any further is also sought along with sanctions and costs.

The Court finds it unnecessary to consider matter submitted outside the pleadings and hereby holds that the amended complaint fails to state a claim for relief as against any and all the defendants.

[1] Because plaintiffs appear *pro se* and raise claims under the Civil Rights Statutes, 42 U.S.C. § 1981 *et seq.*, the Court has given a liberal reading to the amended complaint but still finds it entirely inadequate for reasons elaborated upon below.

[2] Where a litigant raises claims under the Civil Rights Statutes, even though a complaint appears to be insubstantial, the more judicious approach is to assume jurisdiction and then decide whether the pleading states a claim for relief. *See, e. g.*, United States v. Guest, 383 U.S. 745, 756, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); Rhodes v. Meyer, 334 F.2d 709 (8th Cir. 1964), cert. denied, 379 U.S. 915, 85 S.Ct. 263, 13 L.Ed.2d 186 (1964); Jemzura v. Belden, 281 F.Supp. 200 (N.D.N.Y.1968); Joe Louis Milk Co. v. Hershey, 243 F.Supp. 351 (N.D.Ill. 1965); Olson v. Board of Ed., 250 F. Supp. 1000 (E.D.N.Y.1966); Campbell v. Glenwood Hills Hospital, Inc., 224 F. Supp. 27 (D.Minn.1963).

The Amended Complaint

The facts alleged in the amended complaint indicate that plaintiffs were unsuccessful parties in three civil actions consolidated and tried before Justice Dillon in the New York State Supreme Court, in and for the County of Westchester. The defendants in the instant action include Justice Dillon, the successful parties in the state court actions, their counsel, a trial witness and others alleged to have participated in certain real estate transactions which were the subject matter of those actions.

[3] The amended complaint alleges a conspiracy between Justice Dillon and the other defendants to deprive plaintiffs of their property without due process of law and in violation of the equal protection clause of the fourteenth amendment and other constitutional rights, and seeks an order declaring the state court judgment null and void, a permanent injunction restraining all defendants from enforcing that judgment, and damages in the amount of $500,000. from all the defendants other than Justice Dillon.[1]

1. Judicial notice may be taken that the judgment in the state court actions was unanimously affirmed on June 12, 1967 by the Appellate Division, Second Department. Wanylec v. Stambler, 28 A.D.2d 825; County Dollar Corp. v. Empire Park, 28 A.D.2d 822; Prudential Operating Co. v. Wanylec, 28 A.D.2d 824; all three decisions reported in 282 N.Y.S. 2d 695. Appeals were taken to the New

Prior Proceedings

1. This Court denied a preliminary injunction on March 28, 1968 noting that "there is more than a substantial doubt whether there is subject matter jurisdiction and whether plaintiffs have stated a claim upon which relief can be granted." [1]

2. On July 13, 1968, Judge McGohey granted Justice Dillon's motion for summary judgment dismissing the complaint for failure to state a claim under §§ 1981, 1982, 1983 and 1985, 288 F.Supp. 646. Judge McGohey was of the view that, if in fact Justice Dillon did act without jurisdiction, the doctrine of judicial immunity was inapplicable to him and that, consequently, the district court did have subject matter jurisdiction under 28 U.S.C. § 1343. He held, however, that the complaint failed to state a cause of action under §§ 1981 and 1982, inasmuch as they deal only with racial discrimination, and none was alleged in the complaint; that § 1986 was inapplicable to Justice Dillon because no damages were sought against him; that he need not decide whether plaintiffs stated a claim under §§ 1983 and 1985 "for in any event the complaint fails to allege sufficient facts to show that Justice Dillon was part of any such conspiracy if one existed. The complaint does no more than charge Justice Dillon in the most general terms with participation in the alleged conspiracy. This is not enough. • • • The complaint shows only that the judge performed the normal duties of his office in the trial and decision of the issues in a strongly contested litigation."

Plaintiffs' claim of involuntary servitude and Saul Stambler's claim, in the original complaint, that he was convicted of fraud and deceit without a trial, were found frivolous by Judge McGohey.

3. Judge Tenney, on October 7, 1968, granted plaintiffs leave to file an amended complaint pursuant to Rules 59(e) and 15(a) of the Federal Rules of Civil Procedure, in order to give them "an additional opportunity to allege 'with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy', Powell v. Workmen's Compensation Bd., 321 [327] F.2d 131, 137 (2d Cir. 1964)". Judge Tenney specifically stated that the court expressed no opinion as to whether plaintiffs could eventually state a cause of action.

In addition, Judge Tenney granted the defendants' motions to dismiss the complaint as to the corporate plaintiffs because they were not represented, as required, by an attorney at law.

York Court of Appeals, which on November 2, 1967 granted motions to dismiss the appeals. 20 N.Y.2d 883.

2. When the instant motions were heard on January 14, 1969, plaintiff, Saul Stambler, appeared and submitted an affidavit to the Court in which he requested that the writer of this opinion disqualify himself from rendering a decision on these motions on the grounds of possible bias and prejudice. The charge of prejudice is grounded on the facts that, in denying plaintiffs' motion for a preliminary injunction, the Court's memorandum opinion, which discussed the events surrounding the state court proceedings, stated that Justice Dillon "characterized certain conduct of Saul Stambler, • • •, as amounting to deceit."; and that the denial of the motion for a preliminary injunction was erroneous.

A charge that a judge who rules against a litigant is thereby inevitably prejudiced against him is frivolous and harassing. Ironically, the unfounded application for this Court's disqualification parallels, in its logic, the very gist of plaintiffs' complaint in the instant action—his frustration with the result reached by Justice Dillon in the state court actions. The application to recuse for prejudice is hereby denied.

After submitting the above-mentioned affidavit, Saul Stambler submitted no further papers in opposition to the instant motions. Because the Court concludes that the amended complaint fails to state a cause of action, without looking outside the pleadings, plaintiffs have in no way been prejudiced by their failure to submit affidavits or other papers.

Judge Tenney denied the motions to dismiss made by the defendants other than Justice Dillon, as premature, in view of the fact that he was granting leave to amend the complaint.[3]

The Court presently has the amended complaint before it, and the renewed motions by all the defendants.

Discussion

[4] We note initially that plaintiffs invoke the jurisdiction of the Court under 28 U.S.C. §§ 1331, 1332 and 1343. There is no diversity and, therefore, no jurisdiction under § 1332. The court does have jurisdiction under § 1331 if a cause of action is alleged under the fifth, sixth, thirteenth and fourteenth amendments and the jurisdictional amount exists; and under § 1343, if a cause of action is stated under the civil rights act. As indicated above, the Court will assume jurisdiction in order to determine whether plaintiffs have stated a claim for relief.

The Court will consider seriatim each section of the Civil Rights Statute invoked by plaintiffs and each amendment to the constitution.

Sections 1981 and 1982

[5] Sections 1981 and 1982 of title 42 are implementations of the thirteenth and fourteenth amendments and prohibit the denial of equal protection of the laws on the grounds of race or color; and guarantee to non-white citizens equal property rights with white persons. Nothing in the amended complaint conceivably relates to these sections. Therefore, no claim upon which relief can be granted has been alleged under them.

Section 1983

[6] Section 1983 gives a right of action in tort to every individual whose federal rights are infringed by any person acting under color of state law. The protection is extended to any "rights, privileges, or immunities secured by the Constitution and laws".

The requirement that the action be taken under color of state law is indispensable to the establishment of a claim for relief. Although state officials are usually the only people who can act with the authority of the state in order for there to be a misuse of power derived from the state, *e. g.*, Monroe v. Pape, 365 U.S. 167, 184, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Collins v. Hardyman, 341 U.S. 651, 662, 71 S. Ct. 937, 95 L.Ed. 1253 (1951); United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966); Pritt v. Johnson, 264 F. Supp. 167 (M.D.Pa.1967); Campbell v. Glenwood Hills Hosp., Inc., *supra*, state action can be established if the defendants who are not connected with the state are "wilful participant(s) in joint activity with the State or its agents". United States v. Price, 383 U.S. 787, 794 n. 7 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966). Plaintiffs herein, seek to cloak the defendants with the authority of state law by alleging a conspiracy between them and Justice Dillon.

[7] There is no doubt that Justice Dillon is immune from any liability under the Civil Rights Act, *see, e. g.*, Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); Bradford Audio Corp. v. Pious, 392 F.2d 67 (2d Cir. 1968); Fanale v. Sheehy, 385 F.2d 866 (2d Cir. 1967); Beard v. Stephens, 372 F.2d 685 (5 Cir. 1967); Henig v. Odorisio, 385 F.2d 491 (3d Cir. 1967), cert. denied, 390 U.S. 1016, 88 S.Ct. 1269, 20 L.Ed.2d 166 (1967); Rhodes v.

3. On November 8, 1968 Judge Wyatt entered an order denying the application of plaintiffs for an order directing Justice Dillon to appear for the taking of depositions. The following comment by Judge Wyatt is pertinent:

"• • • such motions as the present are harassment to all those concerned. The plaintiffs are taking the time of judges of this Court to deal with essentially frivolous matters to the prejudice of other litigants in this Court. Plaintiffs are strongly advised to desist in such conduct. Continuation can only lead to the imposition of sanctions or the entry of an injunction against plaintiffs or both."

Meyer, 334 F.2d 709 (8th Cir. 1964), cert. denied, 379 U.S. 915, 85 S.Ct. 263, 13 L.Ed.2d 186 (1964); Morgan v. Sylvester, 220 F.2d 758 (2d Cir. 1955), aff'g, 125 F.Supp. 380 (S.D.N.Y.1954); Jemzura v. Belden, 281 F.Supp. 200 (N.D.N.Y.1968). *But see*, United States v. Clark, 249 F.Supp. 720 (S.D.Ala. 1965), where he acts within the course and scope of his judicial duties, as he has done in connection with the state court proceedings with which the instant action is concerned. Plaintiffs have thus failed to state a claim for relief against defendant Justice Dillon, and his motion to dismiss the amended complaint is hereby granted.[4]

The other defendants, who are private persons, cannot therefore be held liable under § 1983 because they did not act in conspiracy with a state official against whom a valid claim could be stated. Consequently, their allegedly wrongful actions were not done under color of state law or state authority. *See, e. g.*, Haldane v. Chagnon, 345 F. 2d 601, 604–605 (9th Cir. 1965); Jemzura v. Belden, *supra*, 281 F.Supp. at 206; Shakespeare v. Wilson, 40 F.R.D. 500, 504–505 (S.D.Cal.1966).

[8] Plaintiffs apparently allege that the defendant attorneys, as officers of the court, supply the requisite connection to state action under § 1983. It is well established that attorneys are not state officers, but private persons, for the purposes of the Civil Rights Act. *See, e. g.*, Haldane v. Chagnon, *supra*, 345 F.2d at 604; Meier v. State Farm Mutual Auto. Ins. Co., 356 F.2d 504 (7th Cir. 1966); Rhodes v. Meyer, *supra*; Jemzura v. Belden, *supra*; Pritt v. Johnson, *supra*.

[9] Nor is a witness at a trial acting under color of state law. *See, e. g.*, Pritt v. Johnson, *supra*.

[10] The Court concludes that the amended complaint fails to state a claim for relief under § 1983 against any of the defendants because Justice Dillon is immune, and the other defendants in no way acted under color of state law. Because it appears beyond doubt that plaintiffs can prove no set of facts to support their allegations of state action, the amended complaint is hereby dismissed for failure to state a claim. *See, e. g.*, Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

[11] Moreover, even assuming *arguendo*, that the mere use of the courts by litigants and their counsel were held to satisfy the requisite state action, this circuit has held that 28 U.S.C. § 1983 cannot be used to redress what are essentially infringements of property rights. *See*, Bradford Audio Corp. v. Pious, *supra*, 392 F.2d at 72; *accord*, Howard v. Higgins, 379 F.2d 227 (10th Cir. 1967); Ream v. Handley, 359 F.2d 728 (7th Cir. 1966); Abernathy v. Carpenter, 208 F.Supp. 793 (W.D.Mo. 1962), aff'd, 373 U.S. 241, 83 S.Ct. 1295, 10 L.Ed.2d 409 (1963). But see Joe Louis Milk Co. v. Hershey, *supra*.

Stripped of its conclusory language, the gist of plaintiffs' amended complaint is that, as a result of Justice Dillon's decision in the consolidated state actions, they have been deprived of their property without due process of law because the judge acted without jurisdiction, and reached an improper and allegedly fraudulently induced result.

Plaintiff Saul Stambler also alleges that he was slandered because the judge remarked in the course of his opinion that Stambler had engaged in fraud and deceit; and that he has been compelled to labor for another without compensation as a result of the judge's decision which imposed a constructive trust on the property acquired by Stambler. These claims are clearly frivolous and do not magically transmute the complaint from one basically concerned with property rights into one seeking to protect plaintiffs' basic liberties.

4. Judicial immunity shelters the judge from civil liability under all the sections of the Civil Rights Act and, therefore, the complaint fails to state a claim against Justice Dillon under all the sections invoked by plaintiffs.

The amended complaint therefore fails to state a claim for relief under § 1983 for the additional reason that only property rights are in issue.

Section 1985

[12] Section 1985(1) is clearly inapplicable. Section 1985(2) provides for recovery of damages for injury suffered from any acts done in furtherance of a conspiracy "for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State * * * with intent to deny to any citizen equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, * * * to the equal protection of the laws". Plaintiffs allege *in haec verba* that defendants conspired with such a purpose in mind.

This section applies only to a conspiracy to deprive an individual of equal protection; and plaintiffs' amended complaint is devoid of any factual allegations to support the conclusorily claimed denial of equal protection. There are no allegations which indicate a "purposeful discrimination between persons or classes of persons" which is essential to support a claimed denial of equal protection; and the necessary discrimination "is not supplied by the opprobrious epithets 'willful' and 'malicious' * * * or by characterizing" what happened "as an unequal, unjust, and oppressive administration of the laws" of the state. Snowden v. Hughes, 321 U.S. 1, 10, 64 S.Ct. 397, 402, 88 L.Ed. 497 (1944) as cited in Morgan v. Sylvester, *supra*, 125 F.Supp. at 387; *accord*, Powell v. Workmen's Compensation Bd., 327 F.2d 131 (2d Cir. 1964).

The Court concludes that the amended complaint fails to state a claim for relief under 28 U.S.C. § 1985(2) because the conspiracy, if there was one, was not directed to the denial of equal protection of the laws, and it appears beyond doubt that plaintiffs can prove no set of facts to support the charge that they were denied the equal protection of the laws. *See, e. g.*, Conley v. Gibson, *supra*, 355 U.S. at 45–46, 78 S.Ct. 99.

In addition to the foregoing reason, the amended complaint also fails to state a claim because no facts are alleged "from which a reasonably-minded person can draw an inference of the alleged conspiracy" Morgan v. Sylvester, *supra*, 125 F.Supp. at 389. Section 1985 not only requires the existence of a conspiracy but acts in furtherance of the conspiracy. Plaintiffs have not satisfactorily alleged either. Plaintiffs characterize the acts of defendants as malicious, conspiratorial and done for the purpose of depriving plaintiffs of their constitutional rights. These characterizations are not supported by any facts and none of the overt acts which the amended complaint sets forth warrant an inference that a conspiracy existed whose purpose was to obstruct justice in order to deny plaintiffs the equal protection of the laws. *See, e. g.*, Collins v. Hardyman, 341 U.S. 651, 659–660, 71 S.Ct. 937, 95 L.Ed. 1253 (1951); Birnbaum v. Trussell, 347 F.2d 86 (2d Cir. 1965); Powell v. Workmen's Compensation Bd., *supra*; Huey v. Barloga, 277 F. Supp. 864, 868 (N.D.Ill.1967); Shakespeare v. Wilson, *supra*.

In relevant part, § 1985(3) allows an injured person to sue for damages where two or more persons conspire "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws", and where an act has been done in furtherance of the conspiracy.

The amended complaint fails to state a claim for relief under this subsection of § 1985 for several reasons.

First, no factual allegations relate to the denial of equal protection or equal privileges and immunities, which are the only rights protected by § 1985(3). *See, e. g.*, Collins v. Hardyman, 341 U.S. 651, 661–662, 71 S.Ct. 937, 95 L.Ed. 1253 (1951); Sarelas v. Sheehan, 326 F.2d 490 (7th Cir. 1963); Walker v. Bank of America Nat'l Trust & Savings

Ass'n, 268 F.2d 16 (9th Cir. 1959); Shakespeare v. Wilson, *supra*; Bradford v. Lefkowitz, 240 F.Supp. 969 (S.D.N.Y. 1965); Morgan v. Sylvester, *supra*.

Plaintiffs merely describe their defeat in the state court litigation as amounting to a denial of equal protection. The Civil Rights Act was not intended to protect an individual from unfounded or even malicious claims in state courts, nor to provide a federal forum for review of state court litigation under the pretext that every defeated litigant can claim a denial of equal protection. The amended complaint does not in any way state a claim which is cognizable under § 1985(3) because the alleged conspiracy in no way deprived plaintiffs of equal protection or equal privileges and immunities. *Id.*

Second, § 1985(3) has been interpreted to require that the conspiracy to deny equal protection be executed under color of state law or authority. *See, e. g.*, Collins v. Hardyman, 341 U.S. 651, 657–658, 71 S.Ct. 937, 95 L.Ed. 1253; Huey v. Barloga, *supra*, 277 F.Supp. at 868, Campbell v. Glenwood Hills Hosp., Inc., *supra*, 224 F.Supp. at 29. The Court has already noted that no state action can be reasonably inferred from the allegations of the amended complaint.

Third, the conspiracy is alleged in conclusory terms only, despite the fact that plaintiffs were given leave to amend in order to "allege with some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." The amended complaint merely describes the actions of the litigants and others involved in the state court proceedings who were seeking to protect their interest in the disputed real estate. Plaintiffs must do more than label as a conspiracy the actions of the defendants. *See* opinion of the Court, *supra* at 1256.

Section 1986

Section 1986 is a derivative section which gives a cause of action against one who neglects to prevent the commission of the wrongs done pursuant to a conspiracy under § 1985. Because it is derivative, the amended complaint fails to state a claim for relief under that section for the same reasons that no claim was made out under § 1985. *See, e. g.*, Huey v. Barloga, *supra*, 277 F. Supp. at 874–875.

The allegations relating to involuntary servitude under 42 U.S.C. § 1994, and under the thirteenth amendment are frivolous as are those under the fifth, sixth and fourteenth amendments.

Attorneys' Fees

[13] Plaintiffs' suit is unfounded and has probably been maintained in bad faith. Plaintiffs accuse defendants with participation in a fraud and conspiracy but have submitted an amended complaint which in no way sets forth in a legally sufficient manner the existence of any wrongdoing on the part of defendants despite the fact that leave had been granted for amendment of the original complaint to supply that deficiency. Plaintiffs were apparently fully aware that they had no facts with which they could support their reckless accusations.

The Court, however, in the exercise of its discretion, denies the grant of attorneys' fees as costs to defendants. Although plaintiffs' action may very well in fact have been frivolous and vexatious, a district judge applying the rules of procedure, granted plaintiffs leave to file an amended complaint. Where this is done, it would be unfair to penalize a litigant by taxing him with attorneys' fees whenever the amended complaint fails to withstand a motion to dismiss for failure to state a claim. Although this litigation is indeed baseless, it has not been so unconscionably oppressive and harassing to warrant the harsh sanctions sought by defendants.

The amended complaint herein is dismissed for its failure to state a claim upon which relief can be granted.

So ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING CO., INC., and EMPIRE PARK INC., and ROSE STAMBLER on behalf of EMPIRE PARK, INC., (a defunct corporation).

68 Civ. 537

Plaintiffs,

Opinion # 36269

-against-

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Defendants.

- -x

WYATT, District Judge,

This is a motion by plaintiffs, said to be under Fed. R. Civ. P. 59(e), to amend the judgment of this Court, entered June 23, 1969, dismissing the action as against all defendants for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b) (6)). The judgment was entered by order of the late Judge Herlands who had filed an opinion on the same day. The amendment sought is to permit service of a further amended complaint and to order the deposition of Mr. Justice Dillon, a justice of the New York Supreme Court (Westchester County), one of the defendants.

The motion was pending before Judge Herlands when he died and has been referred to me by order of the Chief Judge,

filed October 9, 1969.

Plaintiffs are acting for themselves, without the help of counsel.

This motion and the action itself are not only lacking in any merit but the frivolous and harassing character of the litigation furnishes a depressing example of waste of the time of many judges (and their supporting staffs) to the prejudice of other litigants with serious questions to be resolved. The same problem was before me earlier this year when I wrote (Ward v. Pennsylvania New York Central Transportation Company, 68 Civ. 1094, January 21, 1969; affirmed May 1, 1969 (unreported, slip opinions 2071-73), cert. denied ____U.S.____, 38 U.S.L.W. 3129 (Oct. 14, 1969) (No. 368)):

> "The problem disclosed by this motion is most troublesome for the efficient administration of justice. It springs from the fact that plaintiff is acting for himself, without counsel. He has an absolute right to do this because in federal courts 'the parties may plead and manage their own causes personally' or by counsel, according to 28 U.S.C. § 1654. This statute in one form or another has been on the books since the first Judiciary Act of September 24, 1789 (1 Stat. 73, 92).
>
> "Parties are not well advised, however, to act without counsel. I have never observed a meritorious civil cause of action prosecuted by a litigant without counsel. If a claim has merit, counsel can be found to advise and assist. If the claimant is without funds, legal aid societies are usually available. In recent years federal government programs have been developed specifically to make legal assistance in civil matters available to those without funds, for example, the 'Legal Services' program in the Economic Opportunity Act of 1964 as amended (see 42 U.S.C. § 2809(a) (3)).

"There seems little reason, therefore, why any civil claim, not frivolous, should nowadays be prosecuted by the claimant personally.

"The case at bar suggests that those who prosecute civil claims personally, do so because of mistaken views as to the merits in law of their claim and because of strong feelings of mistreatment by those made defendants.

"But when litigants act for themselves they take an unfair and disproportionate part of the Court's time by requiring long study and inexpert documents to discover what the claims are and whether they have any merit. This presents a challenge to the interests of the community as a whole."

The action was commenced, with an attorney acting for plaintiffs, on February 8, 1968. The following situation appears from the amended complaint.

The present plaintiffs were defendants in actions in the New York Supreme Court, Westchester County.

The present defendants, except defendant Mr. Justice Dillon, were parties to the actions in Westchester County or counsel therein or witnesses or participants in real estate transactions involved in the actions. There was a consolidation of the actions and a trial before Mr. Justice Dillon who made various decisions adverse to plaintiffs here, resulting in a judgment against them on April 22, 1965.

Judicial notice may be taken that this judgment was unanimously affirmed on June 12, 1967 by the Appellate Division, Second Department. Wasylec v. Stambler, 28 A.D. 2d 825; County Dollar Corp. v. Empire Park, 28 A.D. 2d 822; Prudential Operating Co. v. Wasylec, 28 A.D. 2d 824: all three

decisions reported 282 N.Y.S. 2d 465. Appeals were taken to the New York Court of Appeals, which on November 2, 1967 granted motions to dismiss the appeals. 20 N.Y. 2d 893.

The theory of this action at bar is that all the defendants, under color of State law, engaged in a conspiracy to deprive plaintiffs of their property in violation of constitutional rights and that this was intended to be done, and was done by means of the rulings of Mr. Justice Dillon in the lawsuit, some of which were contrary to law and some of which were in excess of the jurisdiction of the New York Supreme Court in which Mr. Justice Dillon sat.

The relief sought is a declaration of the State judgment is void, an injunction against its enforcement, and money damages (except as against Mr. Justice Dillon).

A motion by plaintiffs for a preliminary injunction was denied by Judge Herlands, with opinion, on March 28, 1968.

A notice of appeal was filed by plaintiffs on April 29, 1968. Nothing appears to have been done about the appeal except that a motion for a stay was made by plaintiffs in the Court of Appeals and denied on June 6, 1968, apparently the appeal is still pending in the Court of Appeals.

By notice filed July 8, 1968, plaintiffs stated that their attorney "because of ill health" had been "released from his duties" and that plaintiffs were prosecuting the action for themselves.

By order with opinion filed July 13, 1968, Judge McGohey directed summary judgment for Mr. Justice Dillon because "the complaint shows only that the judge performed the normal duties of his office in the trial and decision of the issues in a strongly contested litigation". Judgment in favor of Mr. Justice Dillon was entered on July 23, 1968. No appeal was taken from this judgment.

By order with opinion filed October 7, 1968, Judge Tenney granted a motion by plaintiffs to amend the judgment entered on the order of Judge McGohey and for leave to serve an amended complaint. In effect, this seems to have been to relieve plaintiffs of the final judgment entered in favor of Mr. Justice Dillon, which is authorized by Fed. R. Civ. P. 60 (b) (6).

Thereafter plaintiffs moved before me for an order directing the deposition of Mr. Justice Dillon in aid of an amended complaint. This motion was denied by order, with memorandum opinion, filed November 8, 1968.

An amended complaint was filed by plaintiffs on November 29, 1968.

On December 3, 1968, notice of appeal was filed by plaintiffs from the order of November 8, 1968. It may be doubted that such order is appealable.

The records on appeal on both appeals have been docketed in the Court of Appeals and the appeals are there pending.

All defendants moved to dismiss the action for failure of the amended complaint to state a claim upon which relief can be granted.

By order filed May 20, 1969, the Court of Appeals permitted removal of the records on appeal, presumably for use of Judge Herlands in considering the motions to dismiss.

By order, with opinion, filed June 23, 1969, Judge Herlands granted the motions. Judgment of dismissal was entered on the same day. In dealing with a request (which was denied) by defendants for counsel fees on the motions, Judge Herlands stated that the action was "unfounded and has probably been maintained in bad faith", that plaintiffs made "reckless accusations" and that the action was "indeed baseless".

No appeal was taken from the judgment entered on Judge Herland's order. The time to appeal has probably been extended by the making of the present motion. Gradix v. Kansal, 375 F. 2d 764 (2d Cir. 1967).

The present motion is supported only by arguments already rejected by Judge Herlands.

The motion is denied on the law and in the exercise of discretion.

The plaintiffs are ordered and directed to make no further motions or applications to this Court in this matter

and to file no further papers in this Court except such as may be necessary or appropriate in connection with any appeals taken to the Court of Appeals.

SO ORDERED.

Dated: New York, New York
October 24, 1969

INZER B. WYATT
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 4 - September Term, 1970

(Argued September 14, 1970 Decided [illegible])

Docket No. 34334

Saul Stambler and Rose Stambler, individually and Saul Stambler on behalf of Prudential Operating Co., Inc., and Empire Park, Inc., and Rose Stambler on behalf of Empire Park, Inc., (a defunct corporation),

Plaintiffs-Appellants,

-v-

John J. Dillon, Title Guarantee Co., Granby Realty Corporation, John C. O'Malley, Peter Meylor, David Avstreih, Leonard Weiss, Harry Finke, George Gordon,

Defendants-Appellees.

Before:

WATERMAN, MOORE and SMITH,

Circuit Judges.

Saul Stambler, Rose Stambler, Yonkers, N.Y., pro se

Samuel A. Hirshowitz, First Asst. Attorney General, Shirley Kottler, Asst. Attorney General, Louis J. Lefkowitz, Attorney General of New York, for appellees Dillon, [illegible]

Leonard Weiss, Avstreih, Marino & Weiss, N. Tarrytown, N.Y., for appellees Meylor, Avstreih, Weiss and Gordon,

John J. Doyle, New York City, for appellees Title Guarantee, O'Malley and Granby Realty Corp.

Harry Finke, Finke, Jacobs & Hirsch, New York City, for appellee Finke.

In the within case a judgment was entered in the United States District Court for the Southern District of New York dismissing appellants' amended complaint on the ground that it failed to state a claim upon which relief could be granted. A motion to amend that judgment and for leave to file and serve a second amended complaint who denied and a petition to reargue this motion and for alternative relief was also denied.

From the judgment and post-judgment orders plaintiffs appealed. An exhaustive brief and appendix were filed by appellants pro se, and four separate briefs were filed by their respective counsel on behalf of appellee Harry Finke, appellee John J. Dillon, appellees Peter Vasylos, David Bregstein, Leonard Weiss and George B. Gordon, and appellees Title Guarantee Company, John C. O'Malley and County Builder Corporation, after which appellants timely filed their reply brief.

The appeal was brought on for argument on September 14, 1970, and the court having heard Saul Stambler pro se for appellants and Norbinar Sattler, Assistant Attorney General of the State of New York, and Leonard Weiss, Esq. for appellees, and having considered the record of the case and the briefs and oral representations of counsel, and after due deliberation has been had, it is by the court ORDERED, ADJUDGED and DECREED

that the judgment entered below dismissing appellants' complaint and the post-judgment orders denying appellants' post-judgment motions are affirmed.

Judges of the U. S. Court of Appeals for the Second Circuit

-ja-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -

SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING CO. INC., and EMPIRE PARK INC. and ROSE STAMBLER on behalf of EMPIRE PARK, INC., (a defunct corporation)

Plaintiffs

-against-

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON.

Defendants.

- - - - - - - - - - - - - - - - - - - -

68 CIVIL 537

AMENDED COMPLAINT

Plaintiffs, for their verified complaint, allege:

JURISDICTION

FIRST: The jurisdiction of this Court over this complaint arises under Title 28 U.S.C., Sections, 1331, 1332 and 1343, 2201 and 2202; Title U.S.C., Sections 1981, 1982, 1983, 1985, 1986, 1994; the Constitution of the United States and in particular, Article 1, Sec. 10, and the Fifth, Sixth, Thirteenth and Fourteenth Amendments, thereto.

The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. One of the purposes of this action is to enjoin the defendants from the enforcement and execution of a judgment obtained by them

which judgment is claimed to be invalid as in repugnance to the aforesaid constitutional provisions under which this action is brought.

PARTIES

SECOND: (a) Plaintiffs

1. Saul Stambler (hereinafter called Stambler) is a citizen of the United States and a resident of the City of Yonkers, County of Westchester and State of New York. Stambler is an investigator and process server and has, as a specialty, assisted in establishing the good and marketable titles to real property by the purchase of outstanding minor interests. Stambler has never been indicted by a grand jury for any crime, nor tried by a court and jury, nor convicted of any crime.

Stambler brings this action individually and as an officer, stockholder and director on behalf of

Prudential Operating Co., Inc., a New York corporation, hereinafter called Prudential, and

Empire Park, Inc., a New York corporation, hereinafter called Empire II.

2. Rose Stambler (hereinafter called Mrs. Stambler) is a citizen of the United States and a resident of the City of Yonkers, County of Westchester and State of New York. She is a housewife, but, on occasion, works with Stambler, her husband, in his various endeavors for their mutual benefit. She has never been indicted by a grand jury for

any crime, nor tried by a court and jury, nor convicted of any crime.

Mrs. Stambler brings this action individually and as a stockholder and director of Empire Park, Inc., a defunct New York corporation, hereinafter called Empire I.

(d) Defendants

1. John J. Dillon, (hereinafter called Dillon) is a resident of the State of New York. Dillon is a justice of the Supreme Court of the State of New York.

The jurisdiction of Dillon, is based on the exception to the doctrine of judicial immunity established in Bradley v Fisher, 80 U.S. 335, 351 (1871) wherein it is stated:

> "WHERE THERE IS CLEARLY NO JURISDICTION OVER THE SUBJECT-MATTER ANY AUTHORITY EXERCISED IS A USURPED AUTHORITY, FOR THE EXERCISE OF SUCH AUTHORITY, WHEN THE WANT OF JURISDICTION IS KNOWN TO THE JUDGE, NO EXCUSE IS PERMISSIBLE."

No monetary damages are asked of this defendant.

2. The Title Guarantee Company is an insurance company chartered in New York State in 1883, (hereinafter called Title Guarantee). It examines the records of real property titles, certifies the ownership and, on the basis of its certification, insures the title to real property.

3. County Dollar Corporation is a New York Corporation, (hereinafter called County Dollar) and is an owner and operator of real property at Yonkers, New York known as Cross County Center.

4. John C. O'Malley (hereinafter called O'Malley) is a resident of the State of New York, an attorney at law and officer of the Court and a member of the firm O'Malley & Boyle.

5. Peter Wasylec, (hereinafter called Wasylec) is a resident of the State of New York. Wasylec is a draftsman by trade.

6. David Avstreih is a resident of the State of New York, a member of the law firm of Avstreih, Martino and Weiss, and an officer of the Court.

7. Leonard A. Weiss (hereinafter called Weiss) is a resident of the State of New York and associated with Avstreih. He is an officer of the Court.

8. George Byron Gordon, (hereinafter called Gordon) is a citizen of the United States and a resident of the State of New Jersey.

9. Marcy Finke, (hereinafter called Finke) is a citizen of the United States and an attorney at law, and an officer of the Court. He is a member of the law firm Finke, Jacobs and Hirsch.

THIRD: (a) That, on information and belief, at divers times, from on or about February 1961 to the present date, the defendants herein conspired, each with the others (as more particularly set forth hereinafter) for the purpose of impeding, hindering, obstructing and defeating the due course of justice in the State of New York with intent to deny to the plaintiffs herein the equal protection of the

laws and for the purposes of depriving the plaintiffs of their right to be treated in accordance with due process of law; and to be free of involuntary servitude, that the acts hereinafter set forth, in accordance with said conspiracy, were wilful and malicious; and designed to discriminate against the plaintiffs and deprive them of their rights, privileges and immunities as secured by Article 1, Section 10 and the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendment to the Constitution of the United States and Title 42 U.S.C., sections 1981, 1982, 1983, 1985, 1986, 1994; and under Title 28 U.S.C., sections 1331, 1332, 1343, 2201 and 2202.

(b) That defendants and each of them conspired to damage plaintiffs in their trade and occupation and to interfere with their ability to earn a livelihood by engaging in a conspiracy to limit the use of plaintiffs' freedom by the illegal use of the state judicial power.

(c) That, on information and belief, such malicious acts were accomplished by the misuse of power possessed by virtue of state law and made possible because the wrongdoers were either clothed with the authority of State law, and by virtue of acting under color of such state law did corruptly and wantonly deprive plaintiffs of fundamental rights granted by the Constitution of the United States, as hereinafter alleged, and/or conspired with other named defendants who were not so clothed with authority of State law but, nonetheless,

acted as aforesaid to deprive plaintiffs of their said Constitutional rights to due process of law and equal protection of the laws and freedom from involuntary servitude.

(d) That all of the acts of the defendants in the furtherance as said conspiracy and scheme to deprive the plaintiffs of their liberty and property are hereinafter set forth.

FOURTH: On and about December 7, 1960, Mrs. Stambler purchased all the outstanding corporate stock of Empire Park, Inc., (Empire I) a defunct New York corporation, from Antoinette Gordon and Sadye Schachner, the owners of said stock. Each was paid a valuable consideration.

FIFTH: At no time after December 7, 1960, have the sellers Antoinette Gordon and Sadye Schachner made any demand or claim for the return of said corporate stock nor have either of them made any tender of the consideration paid them, nor has either instituted any action for the rescission of said sale.

SIXTH: At no time has the purchase of the corporate stock of any company been prohibited by any statute of the State of New York, nor has any statute been enacted that the purchase of corporate stock must be approved by any judge of any court.

SEVENTH: Thereafter, Stambler in marshalling the assets of Empire I found those assets to include the strip of land shown in black on the diagram annexed hereto as Exhibit A.

EIGHTH: Through survey, title examination and investigation it was discovered that County Dollar with the active cooperation of Title Guarantee had stolen the parcel of land shown at "C" on Exhibit "A" and concealed that theft through an improper description of the property.

NINTH: Through Finke it was learned that Wasylec was attempting to steal the parcel of land shown at "A" on Exhibit "A" to sell the said parcel to Finke.

TENTH: Wasylec through Avstreih then made an agreement with Stambler to purchase the parcels "A" and "B" on Exhibit "A" for an agreed price of $15,000.00.

ELEVENTH: In pretended compliance with said agreement, Wasylec, Avstreih and Weiss set a time for completion of the sale and closing of title at the offices of Title Guarantee.

TWELFTH: In furtherance of the said conspiracy and scheme the said defendants Wasylec, Avstreih and Weiss completed the purchase of the land and, thereupon, on the same day, commenced an action against the plaintiffs to recover the consideration paid to Prudential, as seller, on the ground that plaintiffs had forced Wasylec to purchase the said land.

THIRTEENTH: Thereafter, in furtherance of the said conspiracy and scheme, Title Guarantee, by an officer Herman Berniker called on Stambler and offered to have the Wasylec action settled and discontinued without cost to the plaintiffs if Stambler would arrange the delivery of a deed

to the land County Dollar and Title Guarantee had stolen shown as Parcel "C" on Exhibit "A".

FOURTEENTH: Upon the refusal of Stambler to arrange for the delivery of the requested deed, and in furtherance of the said conspiracy and scheme, Title Guarantee in the name of County Dollar by O'Malley commenced an action against plaintiff's corporation to have the Court declare that the strip of land did not exist.

FIFTEENTH: Thereafter, in furthorance of said conspiracy and scheme on information and belief Wasylec, Avstreih and Weiss were induced by County Dollar, Title Guarantee and O'Malley to change their calim against plaintiffs from the calim that Wasylec was forced by the plaintiffs to purchase the parcels to the claim that plaintiffs had acted as Wasylec's agents and instead of the land involved being the two parcels purchased by Wasylec, Wasylec, Avstreih and Weiss made claim to the entire strip of land so that County Dollar, Title Guarantee and O'Malley could then increase their claim to include Wasylec.

SIXTEENTH: In furtherance of said conspiracy and scheme, thereafter, on information and belief, Dillon was induced to join and order the two disparate actions to be tried before him at one time.

SEVENTEENTH: Thereafter, a trial was held before Dillon sitting as a justice of the Supreme Court at White Plains, New York, and the other defendants made fraudulent,

false and untrue statements before Dillon and with his encouragement to create a record which would be prolix, confusing and contradictory.

EIGHTEENTH: Despite the testimony and statements of the defendants, Dillon stated in his decision, a copy of which is attached hereto and marked Exhibit "B" that the land existed and that the plaintiffs were not the agents of the defendants or any of them: to wit:

a. As to the existence of the strip of land which defeats the County Dollar claim:

> "Thereafter Finke ordered a title policy from the Title Guarantee Company and its search disclosed a defect in title; to wit, the existence of a gore or strip of land between the filed map of the Pease Estate (Emp. Ex. D) and the revised map of Section 2 of Empire Park #2803 (Emp. Ex. F) The gore ran through the property owned by Wasylec and under contract to Tannenbaum and other property owned by County Dollar Corporation". (Page 1 Exhibit B) (emphasis added)

b. The claim of agency by Wasylec was defeated by this statement by Dillon:-

> "It cannot be said that any fiduciary relationship existed between plaintiff (Wasylec) and Stambler or any of the persons in the Stambler group".
>
> (Page 6, Exhibit B)

NINETEENTH: Thereafter, in furtherance of said conspiracy and scheme and in order to deprive plaintiffs of their liberty and their property for the benefit of the other defendants herein, Dillon, under the color of state law, and without notice to these plaintiffs usurped the powers of his

office, to claim jurisdiction over the sale of the stock by Antoinette Gordon and Sadye Schachner and Dillon so states in his decision, as follows:

> "While it is true that the persons who assigned the stock in Empire Park, Inc., and who executed affidavits to effectuate a conveyance of the gore have not instituted the present action, the court is of the opinion that the doctrine enunciated in the above cited cases should be utilized to protect the interests of those persons who actually sustained damages because of Stambler's wrongful acts". (Page 7 Exhibit B) (Emphasis added)

TWENTIETH: Dillon, thereafter, in furtherance of said conspiracy and scheme, without any formal complaint before him and without the presence of the only two possible plaintiffs, and through the use of Dillon's creative imagination, arrogated to himself the right to charge the plaintiffs, without notice to them with "wrongdoing" and "deceit and fraud" as follows:

> "It is well established that when a person acquires title to property through a scheme of deceit and fraud, as in the instant case, the court will not permit him to retain the fruits of wrong".

TWENTY FIRST: In furtherance of said conspiracy and scheme, Dillon, on the behest of the other defendants arrogated to himself, under color of state law and by virtue of the powers of a Supreme Court Justice, that he, Dillon had the power to approve or disapprove purchases, at arms length between plaintiffs and others who were not parties to any action before him, to wit:

"The Court could not approve of the manner in which title to the gore was acquired by Stambler" (Page 6 Exhibt "B")

TWENTY SECOND: In furtherance of said conspiracy and scheme, Dillon, on the behest of the other defendants, arrogated to himself, under color of State law and the office of Justice of the Supreme Court, the right to hold plaintiffs in involuntary servitude, and to restrict their liberty without any basis in law for the benefit of the other defendants herein as is shown by the following statement of Dillon:

"It is the court's opinion that once Stambler was advised that Finke would not pay him for his service, he was not at liberty to strike out on his own". (page 6 Exhibit B) (Emphasis added.)

"Stambler and his associates will be permitted to retain the sum of $3,000.00 to defray expenses and to compensate Stambler for the fair and reasonable value of the services which he rendered." (page 9 Exhibit B) (Emphasis added)

This holding of the plaintiffs in involuntary servitude is without the showing that any employment of the plaintiffs was ever agreed to by the plaintiffs.

TWENTY THIRD: In furtherance of said conspiracy and scheme, Dillon, at the behest of the other defendants, in order to deceive any appellate or reviewing court and to hide his own acts assisting the theft of the property from the plaintiffs and their corporations, defamed and maligned and attainted plaintiffs, using other false and misleading statements and knowing them to be false and misleading and thereby denied them due process of law, a fair and im-

partial trial and equal protection of the law.

TWENTY FOURTH: In furtherance of said conspiracy and scheme, Dillon, at the behest of the other defendants under color of state law and the powers of a Supreme Court Justice, arrogated to himself the right to impair the obligation of the contract between Wasylec and Stambler's corporation, Prudential.

TWENTY FIFTH: The defendants by their acts described above did deprive the plaintiffs of their liberty and property, deny them due process and equal protection of the law and threaten to inflict further injury and damage to the plaintiffs unless restrained by an order of this Court in violation of their legal rights, for which the plaintiffs have no adequate remedy at law.

WHEREFORE, the plaintiffs pray:

1. That this Court render judgment declaring that the defendants acted in concert to deprive the plaintiffs of their liberty and property and to deny them due process and the equal protection of the law in violation of their rights pursuant to the Constitution of the United States and in particular Article I, Section 10, and the Fifth, Thirteenth and Fourteenth Amendments thereto and in violation of United States Statutes 42 U.S.C. 1981, 1982, 1983, 1985 and 1994.

2. That this Court render judgment declaring that the judgment granted by the defendant Dillon on April 22, 1965 in the actions in Westchester County, New York, entitled

Wasylec v. Stambler, Prudential v Wasylec and County Dollar v Empire Park was based on subject matter over which the defendant Dillon lacked jurisdiction and knew he lacked jurisdiction and is therefore null and void and all acts taken pursuant to said judgment are null and void and

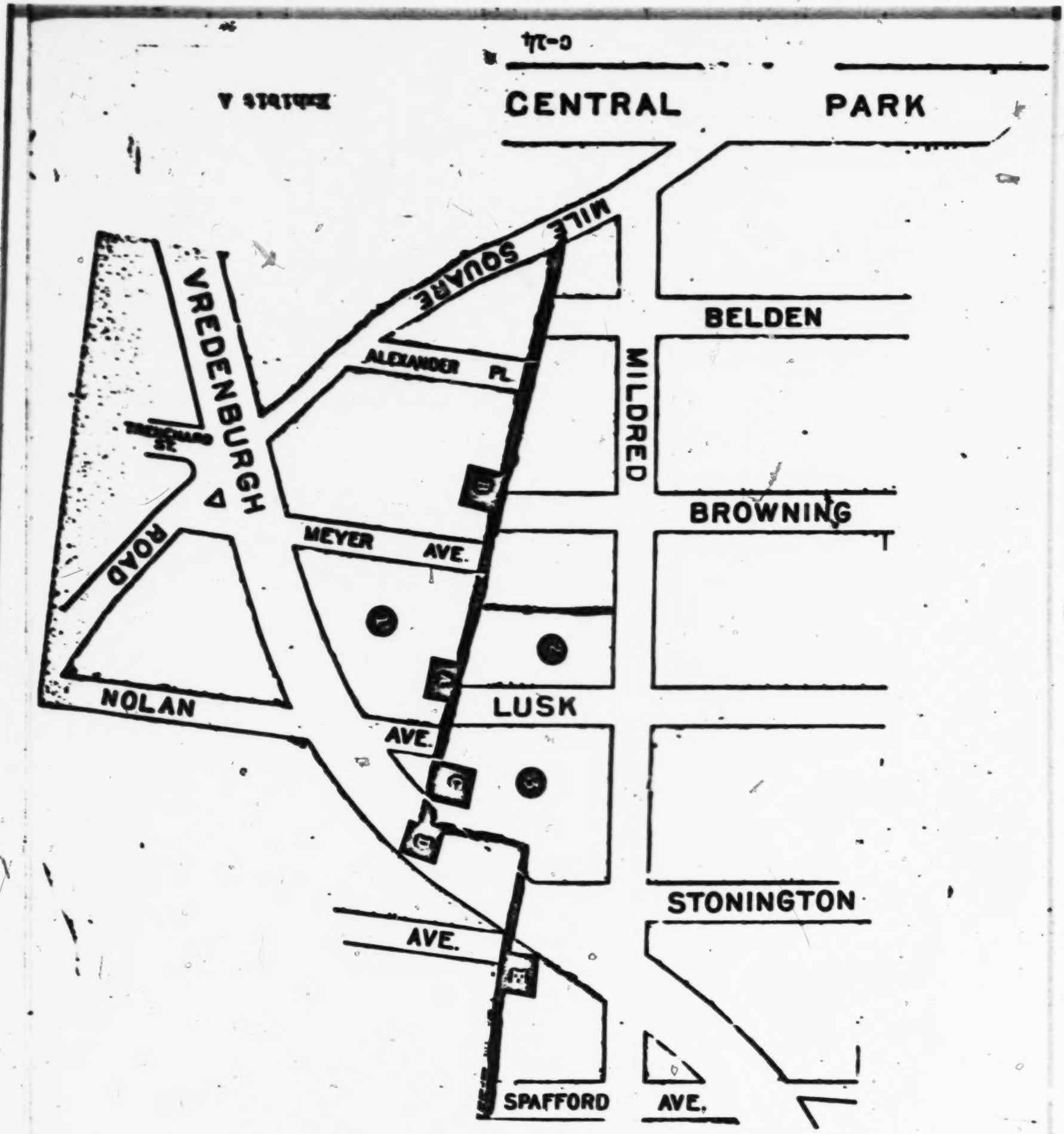
3. That a permanent injunction issue restraining defendants, their agents, attorneys and all persons acting in concert with them or through them from the enforcement, operation or execution of the judgment of the Supreme Court, Westchester County entered April 22nd, 1965 in the actions Wasylec v Stambler, Prudential v Wasylec and County Dollar v Empire Park, Inc., and

4. Restraining defendants, their agents, attorneys, and all persons acting in concert with them or through them from impeding, intimidating, hindering and preventing the plaintiffs from exercising the rights, privileges and immunities guaranteed to them by the Constitution and Laws of the United States, and

5. That plaintiffs be awarded damages in the amount of $500,000.00 and such other lawful damages as the Court may find due, including exemplary and punitive damages, excepting from the claim for damages defendant John J. Dillon.

That the plaintiffs be granted such other, further and different relief as the Court may find appropriate to protect their rights.

SAUL STAMBLER
ROSE STAMBLER
Plaintiffs Pro Se
137 Brandon Road
Yonkers, New York, 10704


CENTRAL
PARK
MILE
SQUARE
VREDENBURGH
ALEXANDER
PL.
BELDEN
MILDRED
BROWNING
MEYER
AVE.
ROAD
NOLAN
AVE.
LUSK
STONINGTON
AVE.
SPAFFORD
AVE.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SAME TITLE

DILLON, J.

THREE consolidated actions arising out of or relating to the question of title to a strip of land located in the City of Yonkers were tried before the court without a jury. From the evidence submitted the court finds the following state of facts.

ON April 20, 1960, Peter Wasylec entered into a contract to sell a vacant and undeveloped parcel of real property in the City of Yonkers to Herbert Tannenbaum for the sum of $130,000. The contract was conditioned upon the rezoning of the property and upon the vendee "executing a lease with a national chain store." The contract vendee was represented by an attorney named Marcy Fink. Fink hired one Jack Jacobs, who was president and sole stockholder of Prudential Abstract Co., Inc. and Prudential Operating Co., Inc., to conduct a title search of the property. Jacobs submitted a report to Fink which disclosed that the property was subject to certain restrictive covenants. The Metropolitan Title Co. refused to issue a title policy insuring against the enforceability of the covenants. Thereafter Fink ordered a title policy from the Title Guarantee Company and its search disclosed a defect in title; to wit, the existence of a gore or strip of land between the filed map of the Pease Estate (Emp. Ex. D) and the revised map of Section 2 of Empire Park #2803 (Emp. Ex. F). The gore ran through the property owned by Wasylec and under contract to Tannenbaum and other property owned by County Dollar Corporation. Both parcels of property had been acquired by the City of Yonkers through in rem tax lien foreclosure

sale and judgment, and there is an issue as to whether the judgment extinguished all rights of former owners in and to the properties, including the alleged gore.

IN any event, when the question of the gore was raised by the report of The Title Guarantee Company in August of 1960, Fink advised Wasylec of the problem and Wasylec stated that he would straighten it out. Wasylec then obtained a quit claim deed to the gore from the survivors of the deceased owner of all but the organizational stock of Empire Park, Inc., the former owner. The Title Guarantee Company considered this deed insufficient to overcome its objection to title. By this time, Fink himself had become a principal in the contract of purchase. In November of 1960, Fink spoke to Jacobs about clearing up the cloud on title, and Jacobs recommended to Fink one Saul Stambler as a man experienced in this field and capable of resolving the problems.

Fink met with Stambler on November 15, 1960, and informed him of the details relating to the cloud on title. Fink testified that he never hired Stambler, but that he recommended Stambler to Wasylec's attorney. Stambler testified that Fink directed him to go out and acquire title to the gore and then offer it for sale to either him or to Wasylec. On December 7, 1960, Stambler advised Fink that he had the situation under control. At this juncture it should be noted that the Title Guarantee Company by letter dated September 8, 1960, addressed to Fink, had advised him that title to the gore or strip of land was vested in Empire Park, Inc. under a deed from Ann N. Sawyer dated November 14, 1924, and that Empire Park Inc. had been dissolved in 1938. Stambler was furnished with all the available information including the fact that the former president of the corporation had

died, survived by a spouse and a son. Stambler communicated with the son, George Byron Gordon, and represented himself to be an officer of a title company which had been hired by Wasylec to clear the title to Wasylec's property. In order to accomplish this Stambler stated that it would be necessary for Gordon and his mother to execute certain documents. Under cover of a letter dated November 30, 1960, on the stationery of Prudential Abstract Co., Inc., Stambler forwarded three instruments to Gordon, an affidavit to be executed by Gordon, and an affidavit and assignment of Empire Park, Inc. stock to be executed by Gordon's mother, Antoinette K. Gordon. The assignment ran from Antoinette K. Gordon to Rose Stambler and when Gordon inquired why the assignment ran to Rose Stambler, he was told by Stambler that it was just a matter of convenience. These documents were executed and forwarded to Stambler. Stambler admitted that at that time he was neither an officer nor employee of Prudential Abstract Co., Inc. and that he was not acting on its behalf. He explained that its stationery was in the office he was using at the time and that he had no stationery of his own. The court has drawn its own conclusion as to Stambler's motive in using the Prudential stationery - the use of such stationery was not merely a matter of convenience or coincidence, as Stambler would have the court believe, but was a part of an overall scheme devised by Stambler to obtain record title to the disputed gore. The use of such stationery was consonant with his prior representation that he was acting on behalf of a title company employed by Wasylec to solve the problems in connection with his property. George Byron Gordon testified that except for the misrepresentations which were believed to be true, he would not have executed the affidavit, nor would he have advised his mother to execute the affidavit and assignment of stock.

Stambler also obtained an affidavit and assignment of stock from one Sadie Schachner. That affidavit, as well as the one from Antoinette K. Gordon, states that it and the stock assignment were made in order "to aid interested parties to sure defects in title to lands formerly owned by Empire Park, Inc." Under no circumstances is the court able to construe the term "interested parties" as an expression of intention to aid and asssist Saul Stambler in obtaining title to the gore. While it is true that Stambler paid Antoinette K. Gordon $750. in consideration for the assignment of her stock interest in Empire Park, Inc., the court is not satisfied that the mere payment of money under the circumstances of this case is sufficient to vest Stambler and/or his assignees with absolute and unencumbered title to the stock.

ON December 31, 1960, Rose Stambler, as "sole surviving director" of Empire Park, Inc. executed a quitclaim deed which purported to convey the gore to Prudential Operating Co., Inc. At this juncture, Wasylec was unable to convey title to the property in accordance with the contract which provided that "seller shall give and purchaser shall accept a title such as any approved title company will approve and insure." In order to satisfy the title company it was necessary for Wasylec to obtain record title to the gore. Wasylec was also being sued by the real estate broker who had negotiated the sale for $6,500. in commissions.

UNDER these circumstances Wasylec agreed with Stambler to pay $15,000 for a conveyance of that portion of the gore which ran through the Wasylec property. A title closing was held on June 26, 1961, at which Prudential Operating Co., Inc. conveyed the necessary portion of the gore to Wasylec for $15,000., and Wasylec simultaneously conveyed his property to

the assignees of Tannenbaum in accordance with the contract of April 20, 1960. As Stambler was leaving the closing he was served with process in the present action initiated by Wasylec.

ACTION No. 1 was commenced by Wasylec against Stambler, his wife, Jacobs, Prudential Operating Co., and the Empire Park corporations, all of which are hereinafter referred to as the Stambler group; in addition, Fink, Tannenbaum, and all of the persons who were interested in the purchase of the Wasylec property are also named as party defendants and they are hereinafter referred to as the Fink group. As against the Stambler group Wasylec seeks recovery of the $15,000. paid for the conveyance of a portion of the gore. He also asks that the court impress an equitable or constructive trust in favor of Wasylec on the remainder of the gore (the portion running through County Dollar's property.)

ACTION No. 2 was commenced by Prudential Operating Co., Inc. against Wasylec and all parties presently interested in the Wasylec property (owners, mortgagees and tenant) and seeks to set aside the conveyance of the gore on the theory of fraud; to wit, that Wasylec had formed the intention to commence an action for the recovery of the purchase price of a portion of the gore prior to the time of its conveyance to him. It is also urged that there was no consideration to support the conveyance. Prudential also seeks recovery of punitive damages in the amount of $100,000. This action was discontinued at the beginning of the trial against all of the defendants except Wasylec and Cross-Thru Corporation.

Action No. 3 was commenced by County Dollar Corporation pursuant to Article 15 of the Real Property Actions and Proceedings Law and seeks judgment against Empire Park, Inc. and Wasylec barring them from

any and all claims to the County Dollar property and determining that County Dollar is vested with absolute title to the property.

The court determines that the proof in Action No. 1 is insufficient to support any of the allegations of fraud and wrongdoing on the part of either Jacobs or Fink or any of the persons in the Fink group. Accordingly, all these defendants are entitled to judgment dismissing the complaint as against them without costs. It cannot be said that any fiduciary relationship existed between the plaintiff and Stambler or any of the persons in the Stambler group. However, in the court's opinion the existence of a fiduciary relationship in and of itself is not the key question to be resolved in determining the liability, if any, of Stambler or the members of his group. Even if Stambler's version and interpretation of the conversations had with Fink relating to the gore were accepted as true, the court could not approve of the manner in which title to the gore was acquired by Stambler, Whether Stambler formed the intent to acquire title to the gore for himself at the very inception of his introduction to the transaction, or whether he only formed such intent after Finke refused to pay him "disbursements" of $1,500., is not the controlling feature of this case. It is the court's opinion that once Stambler was advised that Fink would not pay him for his services, he was not at liberty to strike out on his own. At this juncture, and if his version of the story is accepted as true, he would have been in a position to seek recovery of his disbursements and the fair and reasonable value of his services to date from Fink. He also could have ascertained whether Wasylec wished to retain him. However, the proof is clear that Stambler did not approach Wasylec until after he had acquired title to the gore. The three persons who were instrumental in effectating the conveyance all executed

affidavits, referred to in an earlier portion of the decision, which on their face establish that the motivation for the conveyance was "to aid the interested parties to sure defects in title to lands formerly owned by Empire Park, Inc." (emphasis added). Under all the evidence, including Stambler's letter to George Byron Gordon on the stationery of Prudential Abstract Co., Inc., the words "interested parties" are capable of only one interpretation. "Interested parties" could only mean the parties who had record title to the main parcels of property through which the gore was alleged to exist. It is well established that when a person acquires title to property through a scheme of deceit and fraud, as in the instant case, the court will not permit him to retain the fruits of the wrong, but will impress a constructive trust upon the property in favor of those who in good conscience are entitled to the property (Frier v. J. W. Sales Corp. 261 App. Div. 388, 391). In 319 East 72nd Street Corporation v. George W. Warnecke & Co., Inc. (20 A D 2d 513, app. damd. 13 N Y 2d 1126), the court impressed a constructive trust in favor of the plaintiffs stating:

> "Deceit, it is plain, corrupted Warnecke's course from the outset. * * * * * * * * *
> He was aware that plaintiffs would not have sold to him or to anyone on the terms they did, had they known the truth * * * * * *."

While it is true that the persons who assigned the stock in Empire Park, Inc. and who executed affidavits to effectuate a conveyance of the gore have not instituted the present action, the court is of the opinion that the doctrine enunciated in the above cited cases should be utilized to protect the interests of those persons who actually sustained damages because of Stambler's wrongful acts.

DECISION

Bron v. Weintraub, 42 N. J. 87, is an instructive case. There the highest court of New Jersey was confronted with a comparable problem arising out of a defect in title to real property resulting from the failure to join the heirs of one Harry Weintraub, who had died intestate in 1933, in a tax lien foreclosure sale conducted in 1940. At the time of the sale in 1940, the land was vacant, but when the defect in title was discovered in 1959 homes had been erected on the land and sold to bona fide purchasers. In order to clear title to the property, the municipality commenced a proceeding to bar the Weintraub interests and notice of such proceeding was served on the Weintraub heirs by publication. An individual having more enterprise than conscience thereby learned of the situation. He ascertained the identity and whereabouts of the Weintraub heirs and communicated with them by letter, stating that the 1940 foreclosure action was "possibly defective" and that they "might claim an interest" in the property. The letter made inquiry as to whether the "possible claim" would be released for a "courtesy consideration," of $50. The heirs executed quitclaim deeds upon payment of the "courtesy consideration." The homeowners commenced an action to quiet title and cut off the interests which had thus been obtained from the Weintraub heirs. The court in referring to the letter written to the heirs characterized it as "palpably deceptive," because "it would permit an inference that Harvey led the Weintraub heirs to believe he was acting for the householders, and upon such a finding a constructive trust could be imposed in their favor." The court, however, predicated its decision on the theory of public policy, holding that the policy of the courts is to support tax sales and thereby "aid municipalities in raising revenue." The opinion makes reference to public policy as "reflecting the common conscience" and

points out that it "changes in its demands with the needs and the widely held feelings of the times." The court concluded that the acquisition of title from the Weintraub heirs by a third party was without "social value or contribution" and that (page 95) "decent men must sense only revulsion in this traffic in the misfortunes of others." The court in reaching its determination to impress a constructive trust in favor of the plaintiffs, relied upon the New York case of Latham v. Father Divine, (299 N.Y. 22, 27) in which it was held that the concept of a constructive trust "is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them."

The court determines that it would be grossly unfair and contrary to public policy to permit Stambler and his associates to retain the unconscionable consideration exacted from Wasylec at a time when he was under contract to convey marketable title and when he knew that his default could and probably would result in claims against him by the broker as well as by the prospective purchasers. Stambler and his associates will be permitted to retain the sum of $3,000. to defray expenses and to compensate Stambler for the fair and reasonable value of the services which he rendered. The plaintiff Wasylec is awarded a judgment of $12,000., with interest from June 26, 1961, and costs, against Saul Stambler, Rose Stambler, both of the Empire Park corporations and Prudential Operating Co., Inc. To hold otherwise would be contrary to the time-honored maxim that no one should be permitted to profit by his own wrongful act (Riggs v. Palmer, 115 N. Y. 506).

Action No. 2 is dismissed with costs. The plaintiff in Action No. 3 is granted judgment without cost determining it to be the sole owner

DECISION

in fee simple of the property described in the complaint and barring the defendants from any interest therein, and the cross-claims and counter-claims in Action No. 3 are dismissed without costs.

Submit judgment on notice.

Dated: White Plains, New York
April 9, 1958

John J. Dillon
J. S. C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING CO., INC., and EMPIRE PARK, INC. and ROSE STAMBLER on behalf of EMPIRE PARK, INC. (a defunct corporation),

Plaintiffs,

68 CIVIL 537

-against-

AMENDED ANSWER

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'HALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, NANCY FINKE, GEORGE B. GORDON,

Defendants.

----------x

Defendant, PETER WASYLEC, appears specially herein, and for his amended answer to phintiffs' amended complaint respectfully shows to the Court and alleges:

FIRST: Denies each and every allegation contained in the paragraphs of the plaintiffs' complaint designated FIRST, NINTH, TENTH (page 5 of the complaint), ELEVENTH, TWELFTH, THIRTEENTH, FOURTEENTH, FIFTEENTH (page 6 of the complaint), SIXTEENTH, SEVENTEENTH (page 7 of the complaint), TWENTY-FOURTH (page 9 of the complaint) and TWENTY-FIFTH (page 10 of the complaint).

SECOND: Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph SECOND (a), subparagraphs 1 and 2 (page 2 of the complaint), except admits upon informa-

tion and belief that Saul Stambler and Rose Stambler are residents of the City of Yonkers, County of Westchester and State of New York.

THIRD: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraphs 1 (page 2 of the complaint) except admits that the defendant, John J. Dillon, is a resident of the State of New York and a Justice of the Supreme Court of the State of New York.

FOURTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraph 2 (page 3 of the complaint), except admits that the defendant, Title Guarantee Co., among other things, examines records of real property titles,certifies the ownership and insures the title to real property.

FIFTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraph 3 (page 3 of the complaint).

SIXTH: Denies each and every allegation contained in paragraph THIRD (a) (page 3 of the complaint), THIRD (b) (page 4 of the complaint), THIRD (c) (page 4 of the complaint), and THIRD (d) (page 4 of the complaint).

SEVENTH: Denies each and every allegation contained in the paragraphs of the complaint designated FOURTH, FIFTH, SEVENTH, EIGHTH (page 5 of the complaint), EIGHTEENTH (page 7 of the complaint), NINTEENTH, TWENTIETH, TWENTY-FIRST (page 8 of the complaint), TWENTY-SECOND and TWENTY-THIRD (page 9 of

the complaint), and respectfully refers this Court to the decision of Mr. Justice John J. Dillon rendered on April 9th 1965 after a trial of three consolidated actions, a copy of which decision is annexed to the original complaint.

EIGHTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph SIXTH (page 5 of the complaint).

FIRST DEFENSE

NINTH: That this Court has not jurisdiction of the cause of action set forth in the complaint herein; that at the time of the commencement of this action, the individual plaintiffs, Saul Stambler and Rose Stambler, were residents of the City of Yonkers, County of Westchester and State of New York, and citizens of the State of New York, and the plaintiff corporations were and still are New York corporations; that all of the defendants are either New York corporations or citizens of the State of New York except the defendant, George B. Gordon, a purported citizen of the State of New Jersey; that by reason of the foregoing, this Court has not jurisdiction of the subject matter of this action on the ground of diversity of citizenship, or on any other of the grounds alleged in paragraph FIRST of the complaint.

SECOND DEFENSE

TENTH: That this Court has not jurisdiction over the persons enumerated as plaintiffs and defendants herein.

THIRD DEFENSE

ELEVENTH: That this is an action to restrain the enforcement, vacate, set aside and declare a nullity, a final

judgment of the Supreme Court of the State of New York, County of Westchester, duly entered against the plaintiffs on April 22nd 1965, after trial in the consolidated action entitled as set forth in Exhibit 1 as annexed to the original answer, pursuant to decision of Mr. Justice John J. Dillon rendered on April 9th 1965, a copy of which decision is annexed to the complaint, which judgment was unanimously affirmed on the appeal by plaintiffs herein to the Appellate Division of the Supreme Court, Second Judicial Department by its order entered on June 12th, 1967. The appeal from said judgment of affirmance to the Court of Appeals taken on constitutional grounds was dismissed by order of the Court of Appeals dated November 2nd 1967 "upon the ground that no constitutional question is involved". No application for certiorari was made to the Supreme Court of the United States and the time to make such application has expired. Therefore, this Court does not have jurisdiction of the subject matter of this action and said judgment is res adjudicata of the purported issues in this action, and this Court does not have jurisdiction to stay, vacate, modify, annul or set aside said judgment on any of the grounds urged in the complaint herein.

FOURTH DEFENSE

TWELFTH: The complaint fails to state a claim against these defendants upon which relief can be granted.

WHEREFORE, defendant, PETER WASYLEC, demands judgment dismissing the complaint of the plaintiffs herein, together with the costs and disbursements of this action.

AVSTREIH, MARTINO & WEISS

Attorneys for Defendant,
Peter Wasylec
Office & P.O. Address
20 East First Street
Mount Vernon, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of PRUDENTIAL OPERATING CO., INC., and EMPIRE PARK, INC. and ROSE STAMBLER on behalf od EMPIRE PARK, INC. (a defunct corporation),

Plaintiffs,

68 CIVIL 537

-against-

AMENDED ANSWER

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER WASYLEC, DAVID AVSTREIH, LEONARD WEISS, MARCY FINKE, GEORGE B. GORDON,

Defendants.

----------X

Defendants, DAVID AVSTREIH and LEONARD WEISS, appear specially herein, for their amended answer to plaintiffs' amended complaint, respectfully show to the Court and allege:

FIRST: Deny each and every allegation contained in the paragraphs of the plaintiffs' complaint designated FIRST, NINTH, TENTH (page 5 of the complaint), ELEVENTH, TWELFTH, THIRTEENTH, FOURTEENTH, FIFTEENTH (page 6 of the complaint), SIXTEENTH, SEVENTEENTH (page 7 of the complaint), TWENTY-FOURTH (page 9 of the complaint), and TWENTY-FIFTH (page 10 of the complaint).

SECOND: Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph SECOND (a), subparagraphs 1 and 2 (page 2 of the complaint), except admit upon informa-

tion and belief that Saul Stambler and Rose Stambler are residents of the City of Yonkers, County of Westchester and State of New York.

THIRD: Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraphs 1 (page 2 of the complaint) except admit that the defendant, John J. Dillon, is a resident of the State of New York and a Justice of the Supreme Court of the State of New York.

FOURTH: Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraph 2 (page 3 of the complaint), except admit that the defendant, Title Guarantee Co., among other things, examines records of real property titles, certifies the ownership and insures the title to real property.

FIFTH: Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph SECOND (b), subparagraph 3 (page 3 of the complaint).

SIXTH: Deny each and every allegation contained in paragraph THIRD (a) (page 3 of the complaint), THIRD (b) (page 4 of the complaint), THIRD (c) (page 4 of the complaint), and THIRD (d) (page 4 of the complaint).

SEVENTH: Deny each and every allegation contained in the paragraphs of the complaint designated FOURTH, FIFTH, SEVENTH, EIGHTH (page 5 of the complaint), EIGHTEENTH (page 7 of the complaint), NINETEENTH, TWENTIETH, TWENTY-FIRST (page 8 of the complaint), TWENTY-SECOND and TWENTY-THIRD (page 9 of the complaint), and respectfully refer this Court to the

decision of Mr. Justice John J. Dillon rendered on April 9th 1965 after a trial of three consolidated actions, a copy of which decision is annexed to the original complaint.

EIGHTH: Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph SIXTH (page 5 of the complaint).

FIRST DEFENSE

NINTH: That this Court has not jurisdiction of the cause of action set forth in the complaint herein; that at the time of the commencement of this action, the individual plaintiffs, Saul Stambler and Rose Stambler, were residents of the City of Yonkers, County of Westchester and State of New York, and citizens of the State of New York, and the plaintiff corporations were and still are New York corporations; that all of the defendants are either New York corporations or citizens of the State of New York except the defendant, George B. Gordon, a purported citizen of the State of New Jersey; that by reason of the foregoing, this Court has not jurisdiction of the subject matter of this action on the ground of diversity of citizenship, or on any other of the grounds alleged in paragraph FIRST of the complaint.

SECOND DEFENSE

TENTH: That this Court has not jurisdiction over the persons enumerated as plaintiffs and defendants herein.

THIRD DEFENSE

ELEVENTH: That this is an action to restrain the enforcement, vacate, set aside and declare a nullity, a final judgment of the Supreme Court of the State of New York, County

of Westchester, duly entered against the plaintiffs on April 22nd 1965, after trial in the consolidated action entitled as set forth in Exhibit 1 as annexed to the original answer, pursuant to decision of Mr. Justice John J. Dillon rendered on April 9th 1965, a copy of which decision is annexed to the complaint, which judgment was unanimously affirmed on the appeal by plaintiffs herein to the Appellate Division of the Supreme Court, Secnd Judicial Department by its order entered on June 12th 1967. The appeal from said judgment of affirmance to the Court of Appeals taken on constitutional grounds was dismissed by order of the Court of Appeals dated November 2nd 1967 "upon the ground that no constitutional question is involved". No application for certiorari was made to the Supreme Court of the United States and the time to make such application has expired. Therefore, this court does not have jurisdiction of the subject matter of this action and said judgment is res adjudicata of the purported issues in this action, and this Court does not have jurisdiction to stay, vacate, modify, annul or set aside said judgment on any of the grounds urged in the complaint herein.

FOURTH DEFENSE

TWELFTH: The complaint fails to state a claim against these defendants upon which relief can be granted.

WHEREFORE, defendants, DAVID AVSTREIH and LEONARD WEISS, demand judgment dismissing the complaint of the plaintiffs herein, together with the costs and disbursements of this action.

AVSTREIH, MARTINO & WEISS
Attorneys for Defendants.

David Avstreih & Leonard Weiss
Office & P.O. Address
20 East First Street
Mount Vernon, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

SAME TITLE

68 Civil Action
No. 537

ANSWER

- - - - - - - - - - - - - - - - - -x

Defendant, HARCY FINKE, answering the complaint of the plaintiffs herein, by his attorneys, FINKE, JACOBS & HIRSCH, respectfully alleges and shows to this Honorable Court as follows:

FIRST: Denies each and every allegation of the first paragraph of paragraph "FIRST" of the complaint, and each and every allegation of the second paragraph of paragraph "FIRST", except admits that one of the alleged purposes of this action is to enjoin certain of the defendants (except this answering defendant) from enforcement and execution of a certain judgment obtained by certain defendants and claimed to be invalid, on the ground of its alleged repugnance to the specified sections of certain Federal statutes and specified amendments to the Constitution of the United States of America, but denies that any plaintiff is entitled to any relief under the claimed statutes.

SECOND: Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "SECOND" of the complaint, and of each and every subdivision thereof and all remaining paragraphs of the complaint, except ad-

mits that defendant, Marcy Finke, is a citizen of the United States and an attorney-at-law, and has been and is a member of the law firm of Finke, Jacobs & Hirsch, and that John J. O'Malley is an attorney-at-law, and that the Hon. John J. Dillon is a Justice of the Supreme Court of the State of New York, and that the consolidated actions referred to in the complaint were tried before the said Hon. John J. Dillon in the Supreme Court of the State of New York, in and for the County of Westchester, and that after trial the said Hon. John J. Dillon rendered a decision on the merits in said action, and that a judgment in accordance therewith was duly entered in the Office of the Clerk of the County of Westchester, State of New York.

THIRD: Denies each and every allegation contained in paragraph marked "THIRD" and each and every subdivision thereof and paragrphs "TWENTY-FOURTH" and TWENTY-FIFTH".

FOURTH: Denies any knowledge or information as to each and every allegation contained in paragraphs numbered "THIRD" through "SIXTEENTH" inclusive.

FIFTH: Denies each and every allegation contained in paragraph "SEVENTEENTH" of the complaint, except admits that a trial was held before Mr. Justice Dillon.

SIXTH: Denies each and every allegation contained in paragraphs numbered "EIGHTEENTH" through "TWENTY-SECOND" of the complaint herein, and refers to the decision of Mr. Justice Dillon resulting in a judgment against plaintiffs on April 22, 1963, affirmed by the Appellate Division of the State of New York, Second Department, 28 A.D. 2, 825, 822, 824. Appeals therefrom were taken to the Court of Appeals which on November 2, 1967 granted motions to dismiss the appeal. (20 N.Y. 2, 893).

FOR A FIRST, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE:

SEVENTH: Defendant alleges that heretofore, plaintiffs and defendants, Peter Wasylec, Marcy Finke and other persons and corporations, were parties plaintiffs and defendants in a civil action which was tried in the Supreme Court of the State of New York, at Special Term, Part II of the Equity Term of that Court, held at the County Courthouse in the City of White Plains, County of Westchester, State of New York, on the 1st, 2nd, 5th, 6th and 7th days of October, 1964; that, at the conclusion of the said trial, a judgment was made and duly signed on the 22nd day of April, 1965 by Hon. John J. Dillon, before whom the said case had been tried, and said judgment was duly entered in the Office of the County Clerk of the County of Westchester.

ANSWER

EIGHTH: That the aforesaid action arose out of, or relating to, the question of title to a strip of land located in the City of Yonkers, and that the various plaintiffs and defendants in the said actions, as consolidated by an order of the Supreme Court, in and for the County of Westchester, made various claims, alleging conspiratorial tort, civil fraud, breach of fuduciary obligations, claims to parts of a gore or strip of land, and damages, both compensatory and punitive in character.

NINTH: That all of the parties to the aforesaid action were represented by attorneys of their own choosing, testified on behalf of their respective claims, and were duly cross-examined; that the said trial was conducted in accordance with the procedure prevailing in the State of New York with respect to the trial of civil actions, and that evidence was submitted by the respective parties in accordance with the rules of evidence obtaining with respect to trials of civil actions.

TENTH: That before the commencement of the aforesaid trial, the attorney for Prudential Operating Co., Inc., one of the plaintiffs herein, requested of the defendant, Marcy Finke, permission to discontinue that action without costs, and the said Marcy Finke,

on behalf of himself and his co-defendants named in said action, granted permission for such discontinuance, and the Court, in its judgment, at the conclusion of the trial, dismissed said action of Prudential Operating Co., Inc. as against Marcy Finke and his co-defendants, without costs, and later dismissed the action of Prudential Operating Co., Inc. upon the merits as against the remaining defendants, Peter Wasylec and Cross-Thru Corporation, together with the costs and disbursements of said action.

ELEVENTH: That the remaining actions, consolidated as aforesaid, proceeded thereafter until the conclusion of trial and the entry of judgment; that in the course of said trial, no criminal charge was made or lodged against the plaintiffs herein, and no question was raised by the plaintiffs herein during the course of the trial as to the violation of any of the rights of the plaintiffs in contravention of the Federal statutes mentioned in paragraph "FIRST" of the complaint in this action, or of the various amendments of the Constitution of the United States, also specified in the said first paragraph of the complaint herein.

TWELFTH: That thereafter, the plaintiffs herein appealed from the said judgment to the Appellate

ANSWER

Division of the Supreme Court, Second Department, State of New York, and that after many delays by the plaintiffs herein, the said appeal was fully argued on their behalf by Rene H. Karsten, Esq. who appeared as the attorney for the plaintiffs in this action. Briefs were submitted on behalf of the plaintiffs herein, who were appellants in the said State Supreme Court action, and after passage of a considerable period of time, the Appellate Division of the Second Department unanimously upheld the judgment of defendant, the Hon. John J. Dillon aforesaid.

THIRTEENTH: That thereafter, plaintiffs herein, by the said Rene H. Karsten, Esq., filed a Notice of Appeal in the Court of Appeals, which is the Court of last resort in the State of New York, from the said unanimous affirmance of the Appellate Division, Second Department, claiming the existence of a constitutional question. That thereafter, the Court of Appeals of the State of New York made an order dismissing the said appeal on the ground of the nonexistence of any consitutional question.

FOURTEENTH: That, by reason of the foregoing, there is no controversy of a justifiable nature now before this Court, and that the complaint herein is a transparent attempt to have this Court review the actions of the Courts of the State of New York under

the guise of a spurious claim that Federal statutes specified in paragraph "FIRST" of the complaint and certain amendments of the Consitution of the United States of America have been violated, to the detriment of plaintiffs, by the Hon. John J. Dillon, Justice of the Supreme Court of the State of New York, the Appellate Division of that State, and the Court of Appeals thereof.

FIFTEENTH: That the plaintiffs herein have not been denied the benefit of due process in the trial of the aforesaid action in the State of New York, and now come before this Honorable Court without any warrant or justification in fact or in law, except for the purpose of harassing the defendants herein and forcing them to pay monies to which plaintiffs are not entitled, by instituting a vexatious and costly lawsuit.

AS A SECOND, SEPARATE AND COMPLETE DEFENSE:

SIXTEENTH: Defendant alleges that all relevant issues of fact and law which would properly be cognizable by this Court, if it had jurisdiction, have already been fully and fairly tried in the Court of the State of New York, and that the judgment rendered therein is now res adjudicata.

ANSWER

AS A THIRD, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE:

SEVENTEENTH: Defendant alleges that this Court has no jurisdiction under Sec. 1331 of Title 28, U.S.C., in that this action does not arise under the Constitution, laws or treaties of the United States; nor has this Court jurisdiction because of the absence of the requisite complete diversity of citizenship under Sec. 1332 of Title 28 of U.S.C., since all parties except defendant, Gordon, are citizens of the State of New York; nor does this Court have jurisdiction under Sec. 1343 of Title 28, which relates to Civil Rights and Elective Franchise; nor does this Court have jurisdiction of this case under Sec. 1981 of Title 42. U.S.C., which relates to Equal Rights under the Law; nor does it have jurisdiction under Sec. 1982, which relates to Property Rights of Citizens; nor under Sec. 1983, which relates to Civil Action for Deprivation of Rights; nor under Sec. 1985, which relates to Conspiracy to Interfere with Civil Rights - Preventing an Officer from Performing Duties; nor under Sec. 1986, which relates to the same subject matter entitled "Action for Neglect to Prevent"; nor under Sec. 1994, entitled "Peonage

Abolished"; nor under Sections 2201 and 2202 of said Title 42, U.S.C. which relate to Authority and Powers of the Atomic Energy Commission. Further, as the complaint on its face shows, there was no violation of the Fifth, Sixth, Seventh, Eighth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, and further, this Court has no jurisdiction of this action by reason of the lack of any presentation of facts in the complaint specifying wherein any or all such amendments were disregarded or violated in violation of the rights of plaintiffs herein.

AS A FOURTH, SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE:

EIGHTEENTH: Defendant alleges that the charges of a conspiracy by and among the defendants herein, including a Justice of the Supreme Court of the State of New York, to try and convict plaintiffs of a non-existent crime entitled by the Penal Law Articel 96, "Fraud and Deceit", of the State of New York(which reads: "Frauds and Cheats"); that plaintiffs were pursuant thereto convicted, and stripped of their property, and interdicted and prevented from pursuing their customary calling or occupation; that the defendants knowingly and wilfully committed crimes against the plaintiffs

herein by allegedly violating and breaking the laws and Constitution of the State of New York, and the laws and Constitution of the United States of America; that defendants, as a result of said alleged actions of the defendants herein, caused incalculable damage to the plaintiffs herein - that all such charges are not only scandalous and indecent under Rule 11 of the Rules of Civil Procedure for the United States District Courts, but are wilfully and shamelessly defamatory and libelous in character and totally lacking in any claim to privilege under the laws and decisions of the Courts of the United States, and should be stricken from the records of this Court with appropriate directions to the Clerk of this Court to take such action.

AS A FIFTH, SEPARATE AND DISTINCT COMPLETE DEFENSE:

NINETEENTH: That the complaint herein fails to state a claim for relief.

WHEREFORE, defendant, Marcy Finke, demands judgment dismissing the complaint herein, and the striking of the same from the records of this Court, together with the costs and disbursement of this action.

ANSWER

FINKE, JACOBS & HIRSCH

By: _____
A Member of the Firm

Attorneys for Defendant, FINKE
Office & P.O. Address
393 Seventh Avenue
New York, N. Y. 10001
Tel: BR. 9-4600

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - -x

SAME TITLE

ANSWER TO AMENDED COMPLAINT

- - - - - - - - - - - - - - - - -x

Defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, for their answer to plaintiffs' amended complaint respectfully show to the court and allege:

FIRST: The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, appear specially herein for the purpose of respectfully objecting to the jurisdiction of this Court on the grounds:

1. That the allegations of the amended complaint show that this is nothing more than an action to restrain the enforcement, vacate, set aside, review and declare a nullity, a final judgment of the Supreme Court of the State of New York, County of Westchester, duly entered against the plaintiffs on April 22, 1965 after trial in the consolidated action entitled as set forth in Exhibit "1" hereto annexed which judgment was unanimously affirmed on the appeal by plaintiffs herein to the Appellate Division of the Supreme Court, Second Judicial Department by its Order entered on June 12, 1967. The appeal from said judgment of affirmance to the Court of Appeals taken on constitutional grounds

was dismissed by order of the Court of Appeals dated November 2, 1967 "upon the ground that no constitutional question is involved". No application for certiorari was made to the Supreme Court of the United States and the time to make such application has expired. Therefore, this Court does not have jurisdiction of the subject matter of this action and said judgment is res adjudicata of the purported issues in this action, and this Court does not have jurisdication to stay, vacate, modify, annul or set aside said judgment on any of the grounds urged in the complaint herein.

2. That this action is brought in this Court by plaintiffs, New York corporations and citizens of the State of New York against defendants, all of whom are either New York corporations or citizens of the State of New York except the defendant, George B. Gordon, a purported citizen of the State of New Jersey, for the relief referred to in paragraph "1" above and for $500,000 damages for a purported wrongful conspiracy against plaintiffs arising out of the actions referred to in Exhibit I hereto annexed and the judgment and appeals therein. That by reason of the foregoing this Court has no jurisdiction of the subject matter of this action on the ground of diversity of citizenship or any other of the grounds alleged in paragraph "FIRST" of the amended complaint.

3. That this action does not arise and has no foundation in title 28 U.S.C. Section 1331, 1332, 1343, 2201 and 2202; Title 42 U.S.C. Sections 1981, 1982, 1983, 1985, 1986, and 1994; and in the Constitution of the United States and in particular Article 1 Section 10 and the Fifth, Sixth, Thirteenth and Fourteenth Amendments thereto, relied on by plaintiffs; and this court has no jurisdiction of defendants by reason of such statutes.

4. That even if it be determined that this action is in conspiracy because of the defendants conspiring amongst themselves to obtain a judgment in their favor in the New York State Court actions enumerated in Exhibit I hereto annexed, this Court has no jurisdiction of such action because of want of diversity of citizenship between plaintiffs and defendants and on the further ground that any such action does not arise under the Constitution or the Laws of the United States.

SECOND: Deny each and every allegation contained in the paragraphs of the amended complaint designated "FIRST", "THIRD (a), (b), (c) and (d)", "SEVENTH", "EIGHTH", "THIRTEENTH", "FIFTEENTH", "SIXTEENTH", "TWENTY-THIRD", "TWENTY-FOURTH", and "TWENTY-FIFTH".

THIRD: Deny that they have any knowlede or information sufficient to form a belief as to the truth of any of the allegations contained in the par-

agraphs of the amended complaint designated "SECOND (a), 1 and 2".

FOURTH: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of the amended complaint designated "SECOND (b) 1" except admit that the defendant, Hon. John J. Dillon is a Justice of the Supreme Court of the State of New York.

FIFTH: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of the amended complaint designated "SECOND (b) 5 and 8".

SIXTH: On information and belief deny each and every allegation contained in the paragraphs of the amended complaint designated "FOURTH" and "NINTH".

SEVENTH: Deny that they have any knowedge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraphs of the amended complaint designated "FIFTH", "SIXTH", "TENTH" and "ELEVENTH".

EIGHTH: Deny each and every allegation contained in the paragraph of the amended complaint designated "TWELFTH" except admit the purchase of land by Wasylec from Prudential and the commencement of an action by Wasylec against Prudential to recover the purchase price of $15,000.

tion, have already been fully and fairly tried in the Supreme Court of the State of New York, Westchester County, in the consolidated action set forth in Exhibit "1"; that the judgment rendered therein is now res adjudicata and not subject to review, stay, modification or vacatur by this Court; and that by reason thereof the amended complaint herein fails to state a claim for relief.

AS A SECOND SEPARATE AFFIRMATIVE COMPLETE DEFENSE.

THIRTEENTH: That the facts pleaded in the complaint herein fail to state a claim for relief.

FOR A FIRST SEPARATE AFFIRMATIVE PARTIAL DEFENSE.

FOURTEENTH: That the plaintiffs, Prudential Operating Co., Inc., Empire Park Inc., a defunct corporation, are New York corporations and by reason thereof the defendants, Saul Stambler and Rose Stambler, neither of whom are attorneys-at-law, have any right to appear herein for said corporations or to serve and file an amended complaint on their behalf and therefore, the amended complaint as to said corporate plaintiffs must be dismissed.

WHEREFORE, defendants, The Title Guarantee Company, John C. O'Malley and County Dollar Corporation, demand judgment dismissing the amended complaint with costs.

NINTH: Deny each and every allegation contained in the paragraph of the amended complaint designated "FOURTEENTH" except admit that an action under Article 15 of the Real Property Law of the State of New York was commenced on September 14, 1962 by County Dollar Corporation against Empire Park Inc. to bar all claims of Empire in and to property of County Dollar Corporation.

TENTH: Deny each and every allegation contained in the paragraph of the complaint designated "SEVENTEENTH" except admit that the consolidated actions enumerated in Exhibit 1 hereto annexed were tried before Hon. John J. Dillon, Justice of the Supreme Court, at a Special Term, Part II of the Supreme Court, Westchester County, the trial commencing on the 23rd day of September, 1964.

ELEVENTH: Deny each and every allegation contained in the paragraphs of the complaint designated "EIGHTEENTH (a) and (b)", "NINETEENTH", "TWENTIETH", "TWENTY-FIRST" and "TWENTY-SECOND" except admit the rendering by Hon. John J. Dillon, Justice of the Supreme Court of decision referred to in said paragraphs.

AS A FIRST SEPARATE AFFIRMATIVE AND COMPLETE DEFENSE.

TWELFTH: That all issues of fact and law properly cognizable by this Court, if it had jurisdic-

ANSWER TO AMENDED COMPLAINT

JOHN J. BOYLE
Attorney for defendants,
The Title Guarantee Company,
John C. O'Malley and County
Dollar Corporation
Office & P.O. Address
120 Broadway
New York, N. Y. 10005
Telephone CO 7-2231

SUPREME COURT : WESTCHESTER COUNTY

Action No. 1 - Index No. 4644/1962

PETER WASYLEC,

Plaintiff-Respondent,

against

SAUL STAMBLER, ROSE STAMBLER, PRUDENTIAL OPERATING CO.,INC. and EMPIRE PARK,INC., a domestic corporation which was dissolved and EMPIRE PARK, INC., a domestic corporation,

Defendants-Appellants,

JACK JACOBS, S & H BUILDING CORP., NANCY FINCK, individually, NANCY FINCK, HERBERT TANNENBAUM, DOROTHY RUBIN, DAVID JACOBS and JACK HIRSCH, doing business as S & H BUILDING CO.,,

Defendants.

Action No. 2 - Index No. 7840/1962

PRUDENTIAL OPERATING CO.,INC.,

Plaintiff-Appellant,

against

PETER WASYLEC and CROSS-TINNU CORPORATION,

Defendants-Respondents,

S & H BUILDING CORP., COSMOPOLITAN EQUITIES, INC., CROSS-TINNU CORPORATION, NEW ENGLAND MUTUAL INSURANCE CO., THE GREAT ATLANTIC & PACIFIC TEA CO., and DOROTHY RUBIN, HERBERT TANNENBAUM, NANCY FINCK, DAVID JACOBS and JACK HIRSCH, doing business as S & H BUILDING CO., a co-partnership,

Defendants.

Action No. 3 - Index No. 9934/1962

COUNTY DOLLAR CORPORATION,

Plaintiff-Respondent,

against

EMPIRE PARK, INC. and PETER WASYLEC,

Defendants-Appellants.

Exhibit I

C-53

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

SAUL STAMBLER
ROSE STAMBLER
EMPIRE PARK, INC. (a defunct corporation)
EMPIRE PARK, INC.
PRUDENTIAL OPERATING CO., INC.,

Plaintiffs,

-against-

JOHN J. DILLON
TITLE GUARANTEE CO.
PETER WASYLEC
HARCY FINKE
GEORGE B. GORDON
DAVID AVSTREIH
LEONARD WEISS
JOHN J. O'MALLEY
COUNTY DOLLAR CORPORATION,

Defendants.

- -x

63 Civil Action
No. 537

ANSWER

Defendant, GEORGE B. GORDON, for his answer to plaintiffs' complaint respectfully shows to the Court and alleges:

FIRST: Defendant Gordon appears specially herein to object to the jurisdiction of this Court on the following grounds:

1. All of the plaintiffs and all of the defendants other than defendant Gordon are alleged in the complaint to be New York corporations and citizens of the State of New York. As a result, there is no diversity of citizenship sufficient to sustain the jurisdiction of this Court.

2. There is no Federal question alleged in the complaint for the reason that the statutes which are alleged to apply have no application to the circumstances described in the complaint and the Federal constitutional provisions invoked in the complaint similarly have no application to the circumstances alleged in the complaint.

SECOND: Denies each and every allegation of the first paragraph of the paragraph of the complaint designated "FIRST"; the paragraphs of the complaint designated "SEVENTH", "TWENTY-THIRD", "TWENTY-FOURTH" and "TWENTY-FIFTH."

THIRD: With regard to the second paragraph of the paragraph of the complaint designated "FIRST", admits the allegations thereof except denies that defendant Gordon has any judgment against any of the plaintiffs and that therefore the alleged purposes of the action cannot apply to defendant Gordon.

FOURTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of the following allegations contained in the paragraph of the complaint designated "SECOND": The first paragraph of subdivision (a) 1 and the first paragraph of subdivision (a) 2; subdivisions (b) 2 and (b) 3.

FIFTH: With regard to the second paragraph of subdivision (a) 1 of the paragraph of the complaint designated "SECOND", denies each and every allegation thereof

except admits that Stambler brings this action individually.

SIXTH: With regard to the second paragraph of subdivision (a) 2 of the paragraph of the complaint designated "SECOND", denies each and every allegation thereof and notes that Mrs. Stambler has neither subscribed nor verified the complaint.

SEVENTH: Admits each and every allegation of the following subdivisions of the paragraph of the complaint designated "SECOND": the first and third paragraphs of (b) 1; (b) 4; (b) 5; (b) 6; (b) 7; (b)8; and (b) 9.

EIGHTH: Denies each and every allegation of the second paragraph of subdivision (b) 1 of the paragraph of the complaint designated "SECOND".

NINTH: With regard to the paragraphs of the complaint designated "THIRD", denies that defendant Gordon ever engaged in the conspiracy alleged therein and, on information and belief, denies each and every allegation of said paragraph with regard to conspiracy alleged against other defendants.

TENTH: With regard to paragraph of the complaint designated "FOURTH", admits that Antoinette Gordon executed an instrument assigning any interests it might have in the identified stock and that the recited assignee was Mrs. Stambler, but denies that Mrs. Stambler as such thereby purchased, said stock because the assignor's intention was to assign only to an agent or designee of Peter Wasylec. Admits that Antoinette Gordon was paid the sum of $750 for

such assignment which was the agreed consideration between said assignor and Peter Wasylec.

ELEVENTH: With regard to the allegations of the paragraph of the complaint designated "FIFTH", denies knowledge or information with regard to the allegations regarding Sadye Schachner; and with regard to the allegations relative to Antoinette Gordon admits that said assignor made no demand or claim for the return of said corporate stock nor instituted an action for the recision of said sale for the reason that the purpose of the said assignor to assign to or for the benefit of Peter Wasylec was accomplished by the decision of the defendant Dillon reported in Exhibit B annexed to the complaint.

TWELFTH: Denies that he has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs of the complaint designated "SIXTH", "EIGHTH", "TENTH" and "ELEVENTH".

THIRTEENTH: With regard to the allegations of the paragraph of the complaint designated "TWELFTH", admits that Wasylec purchased certain land and that the action described in Exhibit B annexed to the complaint was commenced against the plaintiffs; refers to said Exhibit B for the nature and character of said action; except as so stated denies each and every allegation.

FOURTEENTH: With regard to the allegations of the paragraph of the complaint designated "THIRTEENTH", denies that defendant Gordon participated in the conspiracy and scheme referred to therein; on information and be-

lief denies the existence of said conspiracy and scheme on the part of the other defendants; and except as so stated, denies knowledge or information with regard to the allegations thereof.

FIFTEENTH: With regard to the allegations of the paragraphs of the complaint designated "FOURTEENTH", "FIFTEENTH" and "SIXTEENTH", admits that actions were commenced as described in Exhibit B annexed to the complaint, refers to said Exhibit for a description of said actions; denies that defendant Gordon participated in the conspiracy and scheme referred to therein and on information and belief denies the existence of such conspiracy and scheme on the part of the other defendants; and except as so stated denies the allegations thereof.

SIXTEENTH: With regard to the allegations of the paragraph of the complaint designated "SEVENTEENTH", denies that defendant Gordon made fraudulent, and untrue statements before Dillon; denies on information and belief that the other defendants made fraudulent, and untrue statements before Dillon; admits that a trial was held before Dillon sitting as a Justice of the Supreme Court at White Plains, New York; and except as so stated, denies each and every allegation thereof.

SEVENTEENTH: With regard to the allegations of the paragraphs of the complaint designated as "EIGHTEENTH" through "TWENTY-SECOND", refers to Exhibit B for the substance thereof; denies that defendant Gordon participated

in the conspiracy and scheme referred to in said paragraphs and, on information and belief, denies that the other defendants participated in any such conspiracy and schemes; and except as so stated, denies the allegations of said paragraphs.

AS A FIRST SEPARATE
COMPLETE DEFENSE

EIGHTEENTH: That the facts pleaded in the complaint herein failed to state a cause of action against defendant Gordon.

AS A SECOND SEPARATE AND
COMPLETE DEFENSE

NINETEETH: That this Court does not have jurisdiction of the subject matter of the cause of action against defendant Gordon sought to be alleged in the complaint.

WHEREFORE, defendant, GEORGE B. GORDON, demands judgment dismissing the complaint with costs.

DANIEL B. GOLDBERG
Attorney for Defendant
George B. Gordon
Office & P.O. Address
51 Madison Ave.
New York, New York 10010
Telephone: 212-685-2000